THE PROSECUTOR'S MANUAL

CHAPTER 15

OBJECTIONS

Table of Contents

THE PROSECUTOR'S MANUAL VOLUME II

Chapter 8

MAKING AND MEETING OBJECTIONS
(Evidence Handbook
For
Arizona Trial Attorneys)

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INTRODUCTION

This handbook is designed to be a handy tool for trial attorneys. Alphabetical tabs can be inserted between sections so you can easily turn to the subject matter you desire. While the handbook may prove to be a starting point for legal research on major evidence questions, it is no substitute for careful research and a trial brief.

APPLICABILITY OF EVIDENCE RULES

A. WHEN EVIDENCE RULES APPLY:

GENERAL RULE: The Evidence Rules (ER) apply in all civil and criminal proceedings except as provided in Section B below. ER 1101(b).

SPECIAL PROCEEDINGS: Evidence Rules apply to the following actions or proceedings, among others:

1. Mental commitment proceedings. A.R.S. §§ 13-4021 to 13-4023.
2. Juvenile Court fact-finding and adjudicatory hearings. A.R.S. § 8-221.
3. Juvenile Court decline hearings.

PRIVILEGES: The law with respect to privileges applies at all stages of all actions, cases and proceedings. ER 1101(c).

B. WHEN EVIDENCE RULES NEED NOT APPLY:

GENERAL RULE: The Evidence Rules (other than with respect to privileges) need not be applied by the judge in the following proceedings:

1. Preliminary questions of fact

   Where the court is required to determine that the issue under ER 104(a); ER 1101 and see "Preliminary Fact Determination", *infra*;

2. Grand jury or inquiry judge: ER 1101(d)
3. Extradition or rendition
4. Preliminary determinations in criminal cases: Comment to ER 1101 and Rule 19.3, Arizona Rules of Criminal Procedure
5. Sentencing; granting or revoking probation
6. Issuance of warrants for arrest, criminal summons or search warrants
7. Release on bail or otherwise
8. Contempt in which the court may act summarily
9. Habeas corpus
10. Small claims court
11. Supplementary proceedings under RCW 6.23
12. Coroner's inquest
13. Juvenile Court decline hearings and dispositions
14. Dispositions under Uniform Alcoholism and Intoxication Treatment Act
15. Dispositions under the Civil Commitment Act Authority: ER 1101

C. NON-JURY TRIAL

RULE: An appellate court in reviewing the record of a non-jury trial will assume the trial court did not consider immaterial or erroneously admitted evidence in reaching its decision. See *Parkinson v.*

Farmers Ins. Co., 122 Ariz. 343, 345, 594 P.2d 1039, 1041 (App. Div. 2 1979).

AMBIGUOUS

FORM: "Objection. The question is ambiguous" or "Objection. Form of the question."

RULE: An ambiguous question is one which is either uncertain or could have two or more meanings. Because an ambiguous question would either confuse the issues or be ineffective in ascertaining the truth, it should not be permitted.

AUTHORITY:

ER 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of ... confusion of the issues....

ER 611(a): The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make interrogation and presentation effective for the ascertainment of the truth, (1) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

"A trial judge must control the courtroom to help ensure a fair trial." *State v. Bible,* 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

"This rule not only gives the court discretion to determine and control the method of interrogation, but the use of the term 'shall' requires that the trial judge 'should not be merely a passive observer in the trial process, but has an affirmative duty to conduct the trial in such a way as to carry out the goals of the rules." *Pool v. Superior Court,* 139 Ariz. 98, 677 P.2d 261, 267 (1984).

ARGUMENTATIVE

FORM: "Objection. Argumentative." or "Objection. Form of the question."

RULE: An argumentative question should not be permitted, for it does not seek facts but rather is designed to persuade the jury by asking the witness to agree with the examiner's inferences, assumptions, or reasons.

EXAMPLE: "But you didn't care whether it was the truth or not before." *State v. Mata,* 125 Ariz. 233, 237, 609 P.2d 48, 52 cert. denied, 449 U.S. 938, 101 S.Ct. 338 (1980).

ASSUMING FACT NOT IN EVIDENCE

FORM: "Objection. The question assumes a fact not in evidence."

RULE: A question that assumes the truth of a fact which has not been proven puts before the trier of fact evidence which may not be true or proven, and it is improper.

LATITUDE ON CROSS-EXAMINATION:

A cross-examination question posed to an *expert witness* which assumes a fact which the

examiner claims will be proven later will normally be permitted. Livermore et al., *Arizona Practice, Law of Evidence,* § 703 (4th ed. 2008). However, if there is a failure of proof later, the party harmed by the expert's opinion may move to strike the opinion or for a mistrial. *Id*. ER 705.

AUTHORITY:

ER 611(A)(1): The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth. . .

INSTRUCTION:

Prior to the adoption of the Evidence Rules, which eliminated the necessity of posing hypothetical questions, the court could instruct the jury that it is to determine whether the facts stated in the hypothetical question were proven, and that if not, it is the duty of the jury to disregard opinions based thereon. Such an instruction-might still be given if the trial court in its discretion required counsel to pose a hypothetical question. ER 703, ER 705. See *Decker v. Ramenofsky,* 91 Ariz. 97, 370 P.2d 258 (1962) (leading Arizona case); *Smith v. John C. Lincoln Hospital,* 118 Ariz. 549, 578 P.2d 630 (App. Div. 1 1978).

EXAMPLE:

"When did you stop beating your wife."

See *Decker v. Ramenofsky*, 91 Ariz. 97, 370 P.2d 258 (leading Arizona case); *Smith v. John C. Lincoln Hospital,* 118 Ariz. 549, 578 P.2d 630 (App. Div. 1 1978).

AUTHENTICATION AND IDENTIFICATION

FORM: "Objection. The exhibit has not been identified." or "Objection. The exhibit has not been authenticated."

A. EXHIBIT NOT SELF-AUTHENTICATING

GENERAL RULE: Under ER 901(a), before a matter (usually an exhibit) is admissible it must be proven to be properly identified or authenticated by "evidence sufficient to support a finding that the matter in question is what its proponent claims" (i.e. the court should admit the matter if a reasonable juror would find it authenticated or identified).

INADMISSIBLE FOR OTHER REASONS: An authentic or identified exhibit may still be admissible for other reasons. For example, an authentic letter may still be inadmissible hearsay. See "Documents - Checklist," *infra.*

PRELIMINARY FACT DETERMINATION: Whether a matter is authentic or identified is a condition precedent to admissibility and should be decided by the judge in accordance with ER 104(a) and then the trier of fact should determine what weight to give it. ER 104(e). See "Preliminary Fact Determination," *infra.*

State v. Sabbot, 16 Wn. App. 929, 931 (1977) holds that all evidence having reasonable connection with issues as well as all evidence tending to establish or disestablish a material fact should be admitted. Courts must be most circumspect and motivated by the most compelling of reasons before depriving a jury of material and relevant evidence having a bearing on the truth.

"The judge does not determine whether the document is authentic, only whether there is some evidence from which the trier of fact could reasonably conclude that it is authentic." Once admitted, the opponent may still contest the authenticity of the document. *State v. King*, 213 Ariz. 632, 636, 146 P.3d 1274,1278 (App. Div. 2 2006).

PROCEDURE FOR INTRODUCING EVIDENCE:

1. HAVE CLERK MARK EXHIBIT FOR IDENTIFICATION

Hand the exhibit to the clerk and ask that it be marked. The clerk will mark the exhibit for convenience, consider having the exhibits marked pretrial. You may wish to maintain your own chart of exhibits with these columns: "Number"; "Description"; "Marked No.'" "Offered"; "Admitted"; and "Witness."

2. HAND EXHIBIT TO OPPOSING COUNSEL

So that he has an opportunity to examine it.

3. HAVE WITNESS IDENTIFY THE EXHIBIT AND ESTABLISH ADMISSIBILITY

Hand the witness the exhibit and ask: (1) if the exhibit has been seen before, and if so, when and where; (2) if the witness knows what it is and, if so (3) the witness should be asked to identify the exhibit without discussing its contents. Do not allow the jury to view the exhibit until it has been admitted into evidence.

4. MOVE TO ADMIT THE EXHIBIT

Once the witness has identified the exhibit, the attorney states, "Offer plaintiff's exhibit number one, your honor." Opposing counsel may now state any objection and grounds or request to voir dire the witness regarding the identification of the exhibit. Thereafter, the court either admits or refuses the exhibit. Counsel should ascertain the basis for refusal. If the objection to the exhibit can be overcome, the exhibit can be reoffered at a later time.

EXAMPLES: The following are examples only and any matter may be found authentic as identified if it satisfies the general rule. ER 901(b).

1. TESTIMONY OF WITNESS WITH KNOWLEDGE

RULE: If a lay witness testifies that a matter is what it is claimed to be, it should be found authentic or identified. ER 901(b)(1). Frequently, this is the simplest and most effective way of authenticating a writing. The rule suggests that evidence of authenticity must be admissible and that hearsay evidence cannot be considered to establish authenticity. Livermore et al., *Arizona Practice, Law of Evidence*, § 901:3 (4th ed. 2008).

Degree of Certainty: An identification of an exhibit may be qualified and need not be made with complete certainty. Varying degrees of uncertainty do not affect admissibility. A qualified identification of an exhibit affects only the weight of the evidence. Livermore at § 901:3.

Chain of Custody: The witness' testimony alone need not be sufficient to identify a matter, and it may be combined with other evidence to establish admissibility. Comment to ER 901(b)(1). It is not necessary to negate every possibility of an opportunity for tampering with an

exhibit, nor to trace its custody by placing each custodian upon the witness stand. The statement that the exhibit is the identical object and that it is in the same condition as of the time of occurrence, while making the exhibit admissible, does not, of course, preclude the right to rebut these statements. *State v. Hurles*, 183 Ariz. 199, 914 P.2d 1291 (1996); *State v. McCray*, 218 Ariz. 252, 183 P.3d 503 (2008).

Example: A witness identifies his own wallet.

2. LAY OPINION (NONEXPERT) ON HANDWRITING

RULE: If a lay witness testifies that handwriting is genuine and has familiarity with the handwriting which was not acquired for purposes of litigation, it should be found to be authentic. ER 901(b)(2).

Example: A witness identifies a letter as having been written by his wife.

3. COMPARISON BY COURT (TRIER) OR EXPERT WITNESS

RULE: If an expert witness or the judge compares an exhibit with specimen which has been found authentic and finds the exhibit authentic, it should be deemed authentic. ER 901(b)(3).

Example: A handwriting expert compares the writing on an exhibit with a handwriting exemplar.

4. DISTINCTIVE CHARACTERSTICS AND THE LIKE

RULE: The appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances may demonstrate the exhibit's authenticity.

Example: Reply letter doctrine: a letter which recites facts which could only be known by the purported author.

5. VOICE IDENTIFICATIONS

RULE: If a witness testifies that a voice, whether heard first-hand or through mechanical transmission or recording, is identical with that of a person based upon the witness' hearing the voice at any time under circumstances connecting it with the speaker, it should be found identified. ER 901(b)(5). *State v. Gortarez,* 141 Ariz. 254, 686 P.2d 1224 (1984).

Example: A witness testifies that he recognizes a person's voice on a tape recording.

6. TELEPHONE CONVERSATIONS

RULE: A telephone conversation should be found identified if:

a) the call was made to a telephone number assigned by the telephone company, AND

b) there is identification on the other end which is EITHER:

1) self-identification and other circumstances show the person answering to be the one called, or

2) in the case of a business, the call was to a place of business and the conversation related to business reasonably transacted over the phone. ER 901(b)(6).

Example: A witness testifies that he called John Doe's telephone number, and the person answering said he was John Doe.

7. PUBLIC RECORDS OR REPORTS

RULE: Authentication and Identification should be found where there is a writing authorized by law to be recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept. ER 901(b)(7). See "Public Records," *infra.*

8. ANCIENT DOCUMENTS OR DATA COMPILATION

RULE: An ancient document should be found authentic when there is evidence that a document or data compilation, in any form:

a) is in such a condition as to create no suspicion concerning its authenticity;

b) was in a place where it, it authentic, would likely be, and

c) has existed 20 years or more at the time it is offered. ER 901(b)(8).

9. PROCESS OR SYSTEM

RULE: An exhibit should be found authentic if there is evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result. ER 901(b)(9).

Examples: Photographs and X-rays.

10. METHODS PROVIDED BY STATUTE OR RULE

RULE: Any method of authentication as identification provided by statute or court rule should suffice to establish authentication or identification. ER 901(b)(10).

11. DEMONSTRATION

RULE: The admissibility of demonstrative evidence (scientific experiment or courtroom demonstration) rests within the sound discretion of the trial court, and such evidence should be based upon conditions and circumstances substantially like the facts which are sought to be proved. See *State v. Hensley,* 142 Ariz. 598, 691 P.2d 689 (1984); *State v. Mincey,* 130 Ariz. 389, 636 P.2d 637, cert. denied 102 S.Ct. 1638 (1981).

12. PHOTOGRAPHS

RULE: A photograph should be admitted if it is a fair and accurate representation of what it depicts. *Lohmeier v. Hammer*, 214 Ariz. 57, 148 P.3d 101 (App. Div. 1 2006).

Gruesome Photos: Distasteful photos are admissible if in the balance the probative value

outweighs the prejudicial effect. *State v. Bracy,* 145 Ariz. 520, 703 P.2d 464 (1985).

13. VIDEO TAPES

RULE: The requirements for admission of a video recording is the same as for a photo, that it fairly and accurately depicts that which it purports to show. *State v. Haight-Gyuro,* 218 Ariz. 356, 186 P.3d 33 (App. Div. 2 2008); *State v. Paul,* 146 Ariz. 86, 703 P.2d 1235 (App. Div. 2 1985).

B. SELF-AUTHENTICATION

1. PUBLIC RECORDS See "Public Records," *infra*.

2. OFFICIAL PUBLICATIONS

RULES: Books, pamphlets, or other publications purporting to be issued by public authority are admissible and no extrinsic evidence of authenticity is required. ER 902(5).

Note: If statutes, court rules and decisions are not published by the government, they are not deemed authentic under this rule.

3. NEWSPAPERS AND PERIODICALS

RULE: Printed materials purporting to be newspapers or periodicals should be found to be authentic and no extrinsic evidence of authenticity is required. ER 902(6).

4 . TRADE INSCRIPTIONS

RULE: Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin should be found authentic and no extrinsic evidence of authenticity is required. ER 902(7).

Examples: Label on "Ajax" soup can. Cattle brand.

5. ACKNOWLEDGED DOCUMENTS

RULE: Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments should be found authentic and no extrinsic evidence of authenticity is required. ER 902(8).

Example: A notarized affidavit.

6. COMMERCIAL PAPER AND RELATED DOCUMENTS

RULE: Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law should be found to be authentic and no extrinsic evidence of authenticity is required. ER 902(9).

Note: This evidence rule incorporates by reference portions of the Arizona U.C.C.: A.R.S. § 47-1307 (certain documents deemed to be *prima facie* evidence of their own authenticity). Comment to ER 902(9).

7. PRESUMPTIONS UNDER STATUTE

RULE: Any signature, document, or other matter declared by applicable statute to be presumptively or *prima facie* genuine or authentic should be found authentic and extrinsic evidence of authenticity is not required. ER 902(10).

Examples: Self-authenticating wills. A.R.S. § 14-2504. Rules and regulations of game commission. A.R.S. § 17-212.

8. SUBSCRIBING WITNESS TESTIMONY UNNECESSARY

RULE: The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing. ER 903.

BEST EVIDENCE

FORM: "Objection. The exhibit is not the best evidence of the contents of . . ."

RULE:

RULE 1: The *original* writing, recording or photographs is required to prove the contents of the writing, recording or photograph unless it falls within an exception provided by the evidence of rules of Arizona or by statute. To prove the content of a writing, recording, or photograph, the original writing, recording or photograph is required, except as otherwise provided in these rule or by applicable statute or rule. ER 1002

RULE 2: A *duplicate* is admissible to the same extent as an original unless the opposing party EITHER:

1. raises a genuine question as to the authenticity of the original, OR

2. raises an objection showing that under the circumstances it would be unfair to admit the duplicate in lieu of the original. ER 1003.

SUMMARY: A duplicate may be used instead of the original unless the opposing party can raise a legitimate objection.

DEFINITIONS

1. "WRITINGS" OR "RECORDINGS"

consist of letters, words, sounds, or numbers or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording or other form of data compilation. ER 1001(1).

2. "PHOTOGRAPHS"

include still photographs, X-ray films, video tapes, and motion pictures. ER 1001(2).

3. "ORIGINAL"

a. The original of a writing or recording is either the writing or recording itself or any counterpart which was intended by the person issuing it to have the same effect as the original.

Example: A xeroxed copy of a contract bearing the original signatures of the parties.

b. The original of a *photograph* includes the negative of any print therefrom.

c. The original of a *computer printout* or similar device output is that printout if it is readable by sight and shown to reflect the data accurately. If date are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original. ER 1001(3).

4. "DUPLICATE"

is a counterpart produced by the same impression or matrix as original, or by photograph (enlargement and miniatures) or by mechanical or electronic rerecording or by chemical reproduction or equivalent techniques to which accurately reproduces the original. ER 1001(4).

DISTINCTION

This rule does not prevent a party from providing a fact other than through the writing, recording or photograph. It is not the better evidence rule.

Example: A party could prove that a couple was married by calling the best man as a witness. The party need not produce the marriage license. It is only if the party attempts to produce a copy of the marriage license that the best evidence rule comes into play.

FUNCTION OF JUDGE AND JURY

RULE: When the admissibility of evidence (other than the original) of the contents of writings, recordings or photographs depends upon fulfillment of a condition precedent (e.g., was the original destroyed), ordinarily the judge will decide this question. See "Preliminary Fact Determination," *infra*.

EXCEPT: The trier of fact (jury or, in a non-jury case, the judge) shall decide the following questions as with other issues in the case:

a. whether an asserted writing ever existed;

b. whether another writing, recording, or photograph produced at trial is the original; and

c. whether other evidence of the contents accurately reflects the contents. ER 1008.

EXCEPTIONS TO BEST EVIDENCE RULE

1. ORIGINAL LOST OR DESTROYED

RULE: The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if all originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith. ER 1004(1). Wills that have been lost or destroyed are governed by A.R.S. § 14-3415 which is not superceded by the Evidence Rule.

Foundation: Whether the original has been lost or destroyed is a preliminary question to be decided by the judge. If the original is claimed lost, the proponent must show a reasonable and diligent search to find the original. See "Preliminary Fact Determination," *infra,* concerning the hearing to determine the unavailability of the original.

2. ORIGINAL NOT OBTAINABLE

RULE: The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if the original cannot be obtained by any available judicial process or procedure. ER 1004(2).

3. ORIGINAL IN POSSESSION OF OPPONENT

RULE: The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

a. The original is in the possession of the party against whom it would be offered;

b. that party was given notice (by pleading or otherwise) that the contents of the original would be a subject of proof at the hearing; and

c. the party does not produce the original. ER 1004(3).

4. COLLATERAL MATTERS

RULE: The evidence is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if it is not closely related to a controlling issue. ER 1004(4).

Reason for Rule: Do not waste time on collateral issues.

5. PUBLIC RECORDS

RULE: Certified copies (see Rule 902) or copies testified to as accurate copies by a person who has compared the copy with the original of official records, or of documents which are authorized to and have been recorded and filed, are admissible. If a certified copy cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be admissible.

See *"Public Records," infra. See also State v. Stone,* 122 Ariz. 304, 594 P.2d 558 (App. Div. 1 1979).

6. SUMMARIES

RULE: A summary, chart or other calculation may be substituted for the originals if:

a. the contents of voluminous writings, recordings, or photographs cannot be conveniently, or photographs cannot be conveniently examined in court; and

b. the originals or duplicates are made available for examination or copying, or both, by the parties at a- reasonable time and place. ER 1006.

NOTE: The court may still order that they be produced in court.

7. TESTINONY OR WRITTEN ADMISSION OF PARTY

RULE: Without accounting for the non-production of the original, the contents of writings, recordings, or photographs may be proved by testimony or deposition of the party against whom offered or by his written admission. ER 1007.

Examples: Adverse party's oral testimony, depositions and writings. Writings responses to requests for admissions.

BEYOND THE SCOPE OF DIRECT/REDIRECT

A. DIRECT

FORM: "Objection. The question goes beyond the scope of direct examination (or redirect)."

RULE: A witness may be cross-examined on *any* relevant matter. ER 611(b).

SCOPE OF DIRECT: The cross-examination is not limited strictly to the questions posed on direct. Rather it should be limited by the purpose of direct examination, and by both subject matter and inferences opened on direct may be explored. *See State v. Parris,* 144 Ariz. 219, 696 P.2d 1368 (App. Div. 1 1985).

CREDIBILITY See "Impeachment." *infra.*

B. REDIRECT

RULE: Redirect examination should be limited to inquire into and rebut matters raised on cross-examination or to rehabilitate the witness. However, the court has discretion to permit inquiry as to new matters. See Livermore et al., *Arizona Practice, Law of Evidence,* § 611:5 (4th ed. 2008).

SCOPE OF REDIRECT: The admission or exclusion of evidence on redirect examination, which is not strictly rebuttal of testimony elicited by cross-examination, is a matter resting in the sound discretion of the trial court. *State v. Talmudge*, 196 Ariz. 436, 999 P.2d 192 (2000).

BUSINESS RECORDS

FORM: "Objection. The exhibit is not qualified as a business record."

QUALIFIED WITNESS: It is unnecessary to call as a witness the person who prepared the record to show that the preparer is unavailable, so long as the record is produced by a custodian and identified by one who supervised its creation. *See State v. McCurdy*, 216 Ariz. 567, 169 P.3d 931 (App. Div. 2 2007).

SUMMARY OF RECORDS: Summaries of voluminous and intricate computer data may be properly admitted when produced by a qualified custodian and properly identified. The court has the discretion to order the full records be produced in court. ER 1006. See Livermore at § 1005:1; *John C. Lincoln Hosp. and Health Corp. v. Maricopa County*, 208 Ariz. 532, 96 P.3d 530 (App. Div. 1 2004).

EXCEPTION TO HEARSAY RULE: Business records are not excluded by the hearsay rule. ER 803(6). But see *State v. Best,*

146 Ariz. 1, 703 P.2d 548 (App. Div. 2 1985) (official police records not included).

HOSPITAL RECORDS: Hospital records are admissible under ER 803(6) subject to the following limitations:

1. DIAGOSTIC OPINIONS

A doctor's opinion, recited in the business record, is not admissible if it is not based on observation and not supported by the record, or the opinion is controversial. *See* ER 703.

2. STATEMENTS BY PATIENT

Statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception of general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment is not excluded by he hearsay rule. ER 803(4).

CRIMINAL CASE: *State v. Lopez*, 217 Ariz. 433, 175 P.3d 682 (App. Div. 2 2008)(Victim's statements to nurse performing sexual assault examination were admissible under hearsay exception).

ABSENCE OF ENTRY:

RULE: Evidence that a matter is not included in the memorandum, reports, records, or data compilations, in any form, kept in accordance with the provisions of Rule 803(6) (records of regularly conducted activity), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness is not excluded by the hearsay rule. ER 803(7).

CHARACTER EVIDENCE (REPUTATION AND PRIOR ACTS)

FORM: "Objection. The question calls for improper character evidence."

A. CRIMINAL CASES

1. REPUTATION

a. RULE: Testimony as to reputation of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in character on a particular occasion unless it falls within one of the exceptions set out below. ER 404(a) and 405.

b. EXCEPTIONS: In general, character--reputation evidence is only admissible if the accused puts it in issue. Once such evidence is introduced, the prosecution may rebut it.

(1) Exception-Character of the Accused

RULE: The reputation (not specific acts) of the accused for a pertinent trait of

character, when offered by the accused, is admissible. Once introduced by the accused, the prosecution may rebut the reputation evidence. ER 404(a)(1) and 405. Character evidence of the accused is to be considered like any other evidence and must meet the test of relevancy. See *State v. Rhodes*, 219 Ariz. 476, 200 P.3d 973 (App. Div. 1 2008). See also Livermore et al., *Arizona Practice, Law of Evidence*, § 405 (4th ed. 2008).

Foundation for Reputation-Testimony: The interrogation of the accused's character witness may follow this format:

Q. Do you know the general reputation of the defendant in' the community in which he lives for (fill in specific trait)?

A. Yes.

Q. What is it - good or bad?

A. Good.

See Livermore at § 405.

Note: The adverse party may be able to bar character testimony by *voir dire* examination of the witness to show that there is insufficient foundation for reputation testimony. For instance, the adverse party may be able to show that the witness is merely a friend who does not know of the accused's general reputation.

Cross-Examination: On cross-examination of a defendant's character witness, inquiry is allowable into relevant specific instances of misconduct. ER 405. The form of the cross-examination question on specific conduct is: "Have you heard that the defendant . . ." Livermore at § 405. A question of a character witness "do you know about ..." is permissible under Rule 405. Rule 405 also allows proof of character by reputation or opinion and also allows questions on cross-examination about relevant specific instances of conduct. When prior bad acts are admitted under this exception, the jury must be given a limiting instruction. *State v. Anthony,* 218 Ariz. 439, 189 P.3d 366 (2008).

(2) Exception-Character of Victim

(a) Rule - Victim's Reputation

The reputation (not specific acts) of the alleged victim of a crime for a pertinent trait of character offered by an accused is admissible. Also, reputation testimony concerning the victim when offered by the prosecution to rebut the same and reputation testimony concerning the character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor are admissible. ER 404(a)(2).

Example: Where the defendant claims self-defense and calls a witness to testify to the reputation of the victim for a violent disposition.

(b) Rule - Victim's Specific Conduct

When the accused claims self-defense, he may call witnesses to testify about the victim's specific acts of misconduct provided there is a showing that the accused was aware of those acts. Such evidence is admissible to show apprehension in the mind of the accused. *State v. Connor*, 215 Ariz.

553, 161 P.3d 596 (App. Div. 1 2007).

(3) Exception--Character of Witness

See Impeachment (Section 6 "Reputation for Untruthfulness") *supra; State v. Hutchinson*, 141 Ariz. 583, 688 P.2d 209 (App. Div. 2 1984).

2. SPECIFIC PRIOR CONDUCT

a . RULE: Evidence of other crimes, wrongs or acts are not admissible to prove the character of a person in order to show that he acted in character.

b. EXCEPTION: that such evidence may be admissible for other purposes such as proof of: (1) motive, (2) opportunity, (3) intent, (4) preparation, (5) plan, (6) knowledge, (7) identity, or (8) absence of mistake or accident.

Test for Admissibility: Whether specific conduct of the above-mentioned purposes depends upon whether the probative value of the evidence outweighs the unfairly prejudicial effect. ER 403

c. LIMITING INSTRUCTION: If the evidence of specific conduct by the defendant is admitted, the defendant is entitled to an instruction limiting the use of such evidence to the purpose for which it was admitted. ER 105. See "Objections-General," *infra,* for format of instruction.

B. CIVIL CASES

RULE: Character evidence, reputation and specific instances of conduct is admissible in those cases in which character or trait of character of a person is an essential element of a charge, claim or defense. ER 405.

COMPOUND QUESTION

FORM: "Objection. Compound question." or "Objection. Form of the question."

RULE: When multiple questions are asked as one, the court has the discretion to sustain an objection to it.

AUTHORITY:

ER 611(a)(1): The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth.

EXAMPLE: "When did you arrive, who was with you and what did you talk about?"

CUMULATIVE

FORM: "Objection. Cumulative."

RULE: When a question is designed to prove something that has already been proven, the court has the discretion to allow or disallow it.

AUTHORITY:

ER 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed. . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The admissibility of cumulative evidence is within the discretion of the trial court. *State v. Verive*, 128 Ariz. 570, 627 P.2d 721 (App. Div. 1 1981).

DOCUMENTS--OBJECTIONS CHECKLIST

Whenever the party intends to introduce a writing, there are several objections that may be applicable. For instance, an authentic letter may still be inadmissible hearsay.

A. OBJECTIONS

1. "Objection. The document has not been properly authenticated." (See "Authentication and Identification," *supra*.)

2. "Objection. Hearsay." (See Hearsay, *infra*.)

3. "Objection. The exhibit is not the best evidence." (See "Best Evidence Rule," *supra*.)

4. "Objection. The document speaks for itself." This is an objection often made when a witness is asked to read an exhibit. Normally, this is not a good objection.

B. INTRODUCTION OF REMAINDER OF RELATED WRITINGS

RULE: When a writing or recorded statement or part thereof is introduced by a party, the adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it. ER 106.

DOCUMENTS-SPEAKS FOR ITSELF

FORM:

Wrong: "Objection. The exhibit speaks for itself."

Right: "Objection: Reading the whole exhibit would be cumulative or a needless waste of time."

IN GENERAL:

Often there will be an objection to the reading of a document on the grounds that it "speaks for itself," and some authority might be found in ER 403 which gives the court authority to exclude "cumulative evidence" (reading what is in evidence is cumulative) or ER 601 which gives the court discretion to "avoid a needless waste of time" (only pertinent parties in issue should be read to have an effective presentation of evidence). However, this objection is not supported by the best evidence rule which deals with whether a document will be admitted and not whether it may be read if it is introduced. Normally such an objection should be overruled (see "Meeting the Objection" below).

RULE:

The judge has the discretion to permit a witness to read an exhibit to the jury and should permit it because:

1. It will avoid a needless waste of time: If the writing does speak for itself, then the party offering the writing could argue that the document should be passed among the jurors so they can read it and this would be more time consuming than to have the witness read it. ER 611 (avoiding waste of time).

2. It will make the presentation of evidence effective for the ascertainment of the truth. ER 611. If the document is not read by the witness, or passed to the jury, the jurors will have to wait until deliberation or closing argument to learn of its contents and the orderly presentation of evidence to the jury will be disturbed.

3. The objecting party is protected against the proponent selecting only parts of the document to be read by ER 106 which gives him the right to have the proponent introduce the remainder of the document or other documents which ought in fairness to be considered contemporaneous with the part read.

EXCLUSION OF WITNESSES

FORM: "I'm requesting the witnesses be excluded."

RULE: At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause. ER 615.

HABIT

FORM: "Objection. Insufficient foundation showing a semi-automatic response."

RULE: Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. ER 406. See also Livermore et al., *Arizona Practice, Law of Evidence,* § 406 (4th ed. 2008).

DEFINITION:

Habit is a semi-automatic, almost involuntary response to a situation. Comment to ER 406. "Habit describes one's regular response to a repeated specific situation." *Boswell v. Phoenix Newspapers, Inc.,* 152 Ariz. 1, 4, 730 P.2d 178, 181 (App. Div. 1 1985), *approved as supplemented,* 152 Ariz. 9, 730 P.2d 186 (1986). "[E]stablishing habit requires more than a sparse selection of isolated episodes." *Gasiorowski v. Hose,* 182 Ariz. 376, 380, 897 P.2d 678, 682 (App. Div. 1 1994).

EXAMPLE:

Conduct was not, under the facts of this case, of the semi-automatic and regular character contemplated by ER 406. *State v. Slover*, 220 Ariz. 239, 204 P.3d 1088 (App. Div. 1 2009).

HEARSAY

FORM: "Objection. Hearsay."

A. RULE

Hearsay and hearsay within hearsay is inadmissible unless within an exception provided by applicable constitutional provisions, statutes, or rules. ER 802 and 805.

NOTE: ER 102 vests the court with the discretion to interpret the Evidence Rules in such a way as to reach a just result and permits the development of the law. Therefore, even if hearsay does not fit a pigeonhole exception, the court might use ER 102 to admit the evidence. However, the drafters of the Evidence Rules intentionally omitted the catch-all section of the Federal Rules which would have granted trial courts great leeway. Comments to ER 803 and 804.

REASON FOR RULE: Since the person who made the statement was not subject to cross-examination when he made the statement, the hearsay is inadmissible.

DEFINITION

WHAT IS HEARSAY: Two pronged test:

1 . An out of court (1) oral or written statement or (2) nonverbal conduct if it is intended by the declarant (person who made statement or act) as an assertion,

AND

2. offered to prove the truth of the matter stated. (i.e., offered to prove what the statement says). ER 801(a)-(c).

SELF-SERVING HEARSAY: See "Self-Serving," *infra*.

EXAMPLE: In a criminal case, the defense tries to avoid subjecting the defendant to cross-examination by having the defendant's exculpatory statements to a police officer introduced.

OTHER EXAMPLE OF HEARSAY: A witness testifies that another person pointed a finger if the conduct was intended as an assertion.

B. FAILURE TO OBJECT

The trier of fact or appellate court may consider hearsay for its probative value if it is admitted without objection. The objection made at the trial level must be specific in order to preserve error for appeal. For instance, the appellate court would not consider a complaint that an offer of evidence was not within the admission exception to the hearsay rule where this hearsay objection was not made at trial. Livermore et al., *Arizona Practice, Law of Evidence*, § 802:1 (4th ed. 2008); *State v. Fischer*, 219 Ariz. 408, 199 P.3d 663 (App. Div. 1 2008); *State v. Tyszkiewicz*, 209 Ariz. 457, 104 P.3d 188 (App. Div. 2 2005).

C. TRIAL TO JUDGE

In a bench trial, the appellate court will assume that hearsay was disregarded in reaching a decision. *Parkinson v. Farmers Ins. Co*., 122 Ariz. 343, 345, 594 P.2d 1039, 1041 (App. Div. 2 1979).

D. PROCEEDINGS WHERE HEARSAY ADMISSIBLE

The Evidence Rules provide that there are several types of proceedings where the court need not 'apply the hearsay rule. ER 1101. See "Applicability of Evidence Rules," *supra*.

E. NON-HEARSAY

RULE: The definition of hearsay is in ER 801(a)-(c) and, ER 801(d) establishes what is non-hearsay. Non-hearsay is admissible as substantive evidence (as opposed to, for instance, prior inconsistent statements which are admissible only to affect the witness' credibility.

1. STATE OF MIND

RULE: Some out-of-court statements are admissible to show circumstantially the state of mind of the declarant or of the person who heard the statement when that state of mind is in issue. The out-of-court statement is offered to prove the truth of the matter stated. ER 801(a)-(c); Livermore at § 801:3.

LIMITS OF THE RULE: If the statement is offered to prove the impact on or the state of mind of the person who heard or read the statement, they are not hearsay. However, if they are offered to show the declarant's belief and to prove the facts that justified the belief, the exception does not apply. See Livermore at § 803:4.

EXAMPLES OF STATEMENT OFFERED TO PROVE DECLARANT'S STATE OF MIND:

Threats of husband/defendant to show motive for later assault on wife/victim.

Threats of victim though uncommunicated to the defendant to show victim was aggressor in self-defense case.

EXAMPLES OF STATEMENTS OFFERED TO PROVE A THIRD PERSON'S STATE OF MIND:

In a homicide case, threats made by victim and communicated to the defendant or statements to defendant by a third person that the victim has threatened the defendant are admissible to show apprehension by the defendant (or if self-defense is claimed). *State v. Via,* 146 Ariz. 108, 704 P.2d 238 (1985).

2. OPERATIVE FACTS

RULE: An out-of-court statement or assertive act which must be proved to establish a case or defense is an operative fact and non-hearsay. It is offered to prove that something was said or done and not to prove the truth of the statement. ER 801(a)-(c). See Livermore at § 801:3.

EXAMPLES:

Proof that a defamatory statement was made is admissible in a defamation case.
Statements establishing a contract in a contract case.

3. PRIOR INCONSISTENT STATEMENT UNDER OATH

RULE: A prior inconsistent statement or assertive conduct is non-hearsay and admissible as substantive evidence if:

a the declarant testifies at the hearing and is subject to cross-examination;

b. that prior statement is inconsistent with his testimony;

c. the prior statement was made at a trial, hearing deposition or other proceedings. (pretrial affidavits may not be admissible, see comment to ER 801), and

d. it was made under oath subject to a perjury penalty. ER 801(d)(1)(A).

REASON FOR RULE: The prior statement was made under such circumstances as to be reliable.

4. PRIOR CONSISTENT STATEMENT

RULE: A prior consistent statement or assertive conduct is non-hearsay and is admissible as substantive evidence if:

a. the declarant testifies and is subject to cross-examination;

b. the prior statement or act is consistent with the witness' testimony, and

c. it is offered to rebut an express or implied allegation of recent fabrication or improper influence or motive. ER 801(d)(1)(13).

5. PRIOR STATEMENT OF IDENTIFICATION

RULE: A prior statement or assertive conduct indicating identification is non-hearsay and admissible as substantive evidence if the declarant testifies and is subject to cross-examination. ER 801(d)(1)(C).

EXAMPLES: A witness testifies that prior to trial he picked the defendant out of a line-up. A witness testifies that prior to trial he identified the defendant's clothing.

6. ADMISSIONS OF PARTY-OPPONENT

a. BY A PARTY

RULE: A statement or assertive conduct by a party in his individual or representative capacity and offered against him is non-hearsay and admissible as substantive evidence. ER 801(d)(2)(A).

b. ADOPTIVE ADMISSION

RULE: ER 801(d)(2)(B). *State v. Anderson*, 210 Ariz. 327, 111 P.3d 369 (2005). Defendant's own statement was held to be admissible under the hearsay exception since the admission, made to a detective, was admissible to prove guilt.

c. ADMISSION BY AUTHORIZED PERSON

RULE: A statement or assertive conduct of a person authorized by a party to make the statement on the subject and which is offered against the party is non-hearsay and admissible as substantive evidence. ER 801(d)(2)(C).

Impeachment of person authorized: Under ER 806, the credibility of the authorized speaker may be impeached as though he had testified except there is no requirement that he be afforded a chance to explain or deny inconsistent statements. See "Impeachment," *infra*.

d. ADMISSION BY AGENT

RULE: A statement or assertive conduct of a person by the agent or servant is non-hearsay and admissible and substantive evidence if: (1) it is offered against the party; (2) the agent or servant was acting within the scope of his agency or employment; and (3) it was made during the existence of the relationship. ER 801(d)(2)(D).

Impeachment of agent of servant: Under ER 806, the agent may be impeached as though he had testified except that he need not be afforded the opportunity to explain or deny inconsistent statements. See "Impeachment," *infra.*

e. CO-CONSPIRATOR STATEMENT

RULE: A statement or assertive conduct by a co-conspirator of a party is non-hearsay and admissible as substantive evidence if it:

(1) is offered against the party; (2) was made during the course of the conspiracy, and (3) was made in furtherance of the conspiracy. ER 801(d)(2)(E).

Impeaching co-conspirator: Under ER 806, a co-conspirator's credibility may be impeached as though he had testified except that there is no requirement that the co-conspirator be afforded the opportunity to explain or deny an inconsistent statement. See "Impeachment," *infra*.

CAVEAT-- CRIMINAL CASES:

The Sixth Amendment Confrontation Clause has been found to be an independent limitation on the receipt of hearsay. In other words, testimonial statements of a witness who does not appear at trial are inadmissible under the Confrontation Clause unless the witness was unavailable to testify, and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). See Livermore at § 802:2.

F. HEARSAY EXCEPTIONS

AVAILABILITY OF DECLARANT IMMATERIAL: ER 803 sets forth 25 exceptions to the hearsay rule where the statement or assertive conduct in question is not excluded by the hearsay rule and there is no requirement that the declarant (person who made the statement) be proven to be unavailable.

1. PRESENT SENSE IMPRESSION

RULE: A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter is not excluded by the hearsay rule and there is no requirement the declarant be proven unavailable. (So-called *res gestae* exception with next exception). ER 803(1).

EXAMPLE: A witness testifies that an unidentified person standing next to the witness at the time of an accident said "that car ran the red light."

2. EXCITED UTTERANCES

RULE: A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not excluded by the hearsay rule though the declarant cannot be shown to be unavailable. ER 803(2).

NOTE: *State v. Jeffers,* 135 Ariz. 404, 661 P.2d 1105 (1983), cert denied, 104 S.Ct. 199. This case laid out the requirements under 803(2) as follows: "(1)there must have been a startling event; (2)the statement must relate to the startling event; and (3)the statement must be made

spontaneously, that is, soon enough after the event so as not to give the declarant time to fabricate. 661 P.2d at 1120. See also Livermore at § 803:3.

RAPE:

Excited Utterance Rule: Rape complaints, including details, which qualify under the above-mentioned rule will be admissible as substantive evidence. *State v. Maldonado*, 138 Ariz. 475, 675 P.2d 735 (App. Div. 2 1983); see also *State v. Aguilar*, 210 Ariz. 51, 107 P.3d 377 (App. Div. 1 2005); *State v. Beasley*, 205 Ariz. 334, 70 P.3d 463 (App. Div. 1 2003).

Fact of Complaint Rule: Even though the requirements of the excited utterance rule are not met, a rape complaint, is admissible as non-hearsay for it shows an absence of fabrication by the rape victim. See *State v. Starcevich*, 139 Ariz. 378, 678 P.2d 959 (App. Div. 2 1983).

EXAMPLE: A witness testifies that at the time of an accident an unidentified person next to him exclaimed, "My God, that car ran a red light!"

3. THEN EXISTING MENTAL, EMOTIONAL PHYSICAL CONDITION

RULE: A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) are not excluded by the hearsay rule and it is not necessary to prove the declarant unavailable. But such statements may not include a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. ER 803(3). See *State v. Machado*, 224 Ariz. 343, 230 P.3d 1158 (App. Div. 2 2010); *State v. Hoskins*, 199 Ariz. 127, 14 P.3d 997 (2000).

DISTINCTION FROM NON-HEARSAY: This exception can easily be confused with the "State of mind" non-hearsay rule (*infra*, A.1). While this exception covers statements offered for truth, the non-hearsay rule covers statements not offered for the truth but to circumstantially prove state of mind. See Livermore at§ 803:4.

TYPES OF STATEMENTS GOVERNED BY THE RULE:

a. Declaration of Symptoms and Other Statements to Physicians: Statements of the declarant's present pain and suffering (not memory of past suffering) to a doctor or a layman is admissible.

Note: Statements of past suffering may be admissible under the exception B.4 if related to treatment or diagnosis.

b. Declaration of Present Mental State in Issue:

Example: A statement of intent at the time of an act is admissible to prove intent when intent is at issue. Livermore at § 803:4.

c. Declaration of Present Mental State to Prove Act: Declarant's statement of a plan to do an act is admissible to prove he probably did the act. *Id.*

4. STATEMENT FOR MEDICAL TREATMENT OR DIAGNOSIS

RULE: Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment are not excluded by the hearsay rule and are admissible as substantive evidence and it

is not necessary to prove the declarant is unavailable. ER 803(4).

5. RECORDED RECOLLECTION: Past recollections recorded are not excluded as hearsay. ER 803(5). See "Past Recollection Recorded," *infra*.

6. BUSINESS RECORDS: Business records and the absence of business records are not excluded as hearsay. ER 803(6) and (7). See "Business Records," *infra*.

7. PUBLIC RECORDS AND REPORTS AND ABSENCE THEREOF: Public records and the absence of public records are not excluded as hearsay. ER 803(8) and (10). See "Public Records," *infra*.

8. OTHER EXCEPTIONS: ER 803 states that the following are not excluded by the hearsay rule, even though the declarant is available as a witness:

   a. Records of Vital Statistics: Records or data compilations, in any form, of birth, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law. ER 803(9).

   b. Record of Documents Affecting an Interest in Property: The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office. ER 803(14).

   c. Statements of Documents Affecting an Interest in Property: A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document. ER 803(15).

   d. Statements in Ancient Documents: Statements in a document in existence 20 years or more whose authenticity is established. ER 803(16).

   e. Market Reports, Commercial Publications: Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations. ER 803(17).

   f. Learned Treatises: To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. ER 803(18). See "Impeachment (Experts)," *infra*.

   g. Reputation Concerning Personal or Family History: Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history. ER 803(19).

   h. Reputation Concerning Boundaries or General History: Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the

community, and reputation as to events of general history important to the community or state or nation in which located. ER 803(20).

i. Reputation as to Character: Reputation of a person's character among his associates or in the community. ER 803(21).

j. Judgment of Previous Conviction: Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of 1 year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility. ER 803(22).

k. Judgment as to Personal Family, or General History, or Boundaries: Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation. ER 803(23).

G. HEARSAY EXCEPTIONS-DECLARANT UNAVAILABLE

ER 804 establishes four exceptions to the hearsay rule which require proof that the declarant is unavailable before the hearsay statement is admissible.

"UNAVAILABILITY AS A WITNESS" DEFINED:

1. UNAVAILABLE

ER 804(a) indicates that a witness will be considered unavailable under the following five (5) different situations:

a. Exempted by Privilege: The declarant is exempted by ruling of the court on the grounds of privilege of the court on the grounds of privilege from testifying concerning the subject matter of the statement. ER 804(a)(1).

Example: A declarant claims an attorney-client privilege and the court admits the witness' former testimony.

b. Refusal to Testify: The declarant persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so. ER 804(a)(2).

c. Lack of Memory: The declarant testifies to a lack of memory of the subject matter of his statement. ER 804(a)(3).

Voir Dire of Witness. If the witness claims he does not recall, the opposing party may request to inquire of the witness before the hearsay is admitted. The adverse party could attempt to discredit the witness' claim of memory failure, because the court has the discretion to refuse the hearsay if the judge does not accept the witness' claimed lack of memory. Comments to ER 804, Federal Rules of Evidence.

d. Death, Physical or Mental Illness: The declarant is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity. ER 804(a)(4).

e. Absence from Hearing: The declarant is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under ER 804(b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means. ER 804(a)(5).

2. WRONG DOING: If the unavailability of the witness is the product of the wrong doing of the party who offers the hearsay, the witness will not be considered unavailable and the hearsay will not be admissible. ER 804(b)(6).

3. NECESSARY EFFORTS TO MAKE WITNESS AVAILABLE: The prosecution must make stringent efforts to make the testimony of the prosecution's witness available because a defendant has the constitutional right to confront has accusers under the Sixth Amendment. See *State v. Edwards*, 136 Ariz. 177, 665 59 (1983); see also *State v. Bocharski*, 218 Ariz. 476, 189 P.3d 403 (2008). The defendant in a criminal case and parties to a civil case need not make such a strong showing of an effort to obtain the witness' testimony.

4. FORMER TESTIMONY

RULE: Prior testimony of the declarant given as witness is not excluded by the hearsay rule if the following conditions are met:

a. the declarant is unavailable as a witness;

b. the testimony was given at another hearing of the same or different proceedings or in a deposition taken in compliance with law in the course of the same as another proceedings;

c. the party against whom the testimony is offered, or in a civil action or proceeding, a predecessor in interest, has an opportunity and similar motive to develop the testimony by direct, cross or redirect examination. ER 804(b)(1); Ariz. R. Crim. P. 19.3(c).

5. DYING DECLARATION

RULE: Dying declarations both of fact and opinion will not be excluded by the hearsay rule if the following conditions are met:

a) the declarant is unavailable as a witness (in a civil case the declarant may be unavailable for reasons other than death);

b) the statements are offered in a homicide case or a civil action or proceeding;

c) the statement concerned the cause or circumstances of what the declarant believed to be his impending death, and

d) when the declarant made the statement, he believed death was imminent. ER 804(b)(2).

6. DECLARATION OR STATEMENT AGAINST INTEREST

RULE: Under ER 804(b)(3), a statement against interest is not excluded by the hearsay rule if the following conditions are met:

a) the declarant is unavailable as a witness;

b) a reasonable man in the declarant's position would not have made the statement unless he believed it to be true;

c) the statement was against one of the following interests:

i. pecuniary

ii. proprietary

iii. against subjecting him to civil liability or to render invalid a claim by him against another, or

iv. penal i.e., would tend to subject the declarant to criminal liability.

Additional conditions for admissibility: If the defendant offers a statement against penal interest, the statement is only admissible if corroborating circumstances clearly indicate the trustworthiness of the statement. See *State v. Fisher*, 141 Ariz. 227, 686 P.2d 750 (1984); *State v. Harrod*, 200 Ariz. 309, 26 P.3d 492 (2001), vacated on other grounds 536 U.S. 953 (2002).

IMPEACHMENT (CROSS-EXAMINATION)

FORM: "Objection. Improper attempted impeachment because …."

A. WHO MAY BE IMPEACHED

RULE: The credibility of a witness may be attacked by any party, including the party calling him. ER 607.

REASON FOR RULE: A party does not vouch for any witness, including his own, and therefore may impeach any witness' credibility.

B. LEADING QUESTIONS

Leading questions aid an attorney who is attempting to impeach a witness. An attorney may not only lead on cross-examination but also on direct when: necessary to develop his testimony, or the witness is hostile, an adverse party or identified with an adverse party. ER 611(c).

See "Leading Questions," *infra*.

C. GUIDELINES FOR IMPEACHMENT (CROSS-EXAMINATION)

DON'T:

1. Impeach unless necessary. Rather, seek favorable admissions or if possible, announce, "No questions."

2. Allow the witness to reiterate direct testimony.

3. Ask a question unless you know the answer will be beneficial (Don't ask open ended "Why?"-type questions).

4. Open the door to subject matter that would be damaging on redirect.

5. Misstate the evidence.

6. Permit the witness to run over you. (Ask court to strike non-responsive answers. Ask simple, single subject questions.)

7. Be discourteous or lose your temper and argue with the witness.

8. Ask questions without a good faith basis.

DO:

1. Prepare for cross-examination by asking yourself:

   a. Is it appropriate to impeach or would it be better to elicit favorable admissions usable in closing?

   b. What are the anticipated major weaknesses in the witness's testimony?

   c. What evidence rules apply to the planned cross-examination?

2. Listen carefully to direct; it may give the key to cross-examination.

3. Make major points and not small ones. Make major points early.

4. Use short, clear questions.

5. Use a step-by-step attack.

6. Keep the objective of cross hidden from the witness.

7. Be brief.

8. Analyze the witness and apply appropriate techniques:

   a. Perjurer: Usually not prepared on incidentals.

   b. Exaggerating witness: Lead to point where beyond belief.

   c. Agreeable witness: Lead to favorable admissions.

   d. Talkative: Don't let him make a speech.

9. Be courteous.

10. End on a high note.

D. IMPEACHMENT RULES

1. LACK PERSONAL KNOWLEDGE:

Even though the judge finds that a witness is qualified to testify because he has some personal knowledge of an event, a party has the right to show inadequate personal knowledge to affect the weight or credibility of the witness. See "Preliminary Fact Determination" and "Incompetency," *infra.*

2. INCOMPETENCE:

Although the judge finds a witness competent, ER 104(e) permits the introduction of evidence to effect the weight and credibility of a witness. See "Incompetency," *infra.*

MENTAL INCOMPETENCE OR INTOXICATION: Cross-examination or introduction of such evidence is permitted if it can be shown that the witness's powers of observation or other testimonial qualities were affected. The admission of such evidence is within the sound discretion of the court. Livermore et al., *Arizona Practice, Law of Evidence*, § 608:5 (4th ed. 2008).

3. BIAS AND INTEREST:

Cross-examination of a witness for the purpose of showing bias, prejudice or interest is a matter of right, but the scope or extent of such cross-examination is a matter resting in the sound discretion of the court. Livermore at § 608:6.

EXAMPLES:

Hostility towards a party. *Id.*

Family, business or other relationship between witness and a party. *Id.*

Guilty plea by a state's witness who was the defendant's accomplice. *Id.*

EXTRINSIC EVIDENCE: Arizona law is unclear about whether extrinsic evidence is admissible to attack a witness' bias. However, the U.S. Supreme Court has ruled that evidence of bias is not subject to Rule 608 because bias evidence is not evidence of character for (un)truthfulness. *United States v. Abel*, 469 U.S. 45, 64 105 S.Ct. 465, 470 (1984). But see Livermore at § 608:6 (citing *Abel* and arguing that bias may amount to a character trait).

LIMITING INSTRUCTION: If requested, a limiting instruction should be given. See "Objection-General," *infra.*

4. PRIOR CONVICTION:

Prior convictions are admissible under ER 609(a) to affect credibility if these conditions are met:

a. The TYPE OF CRIME is EITHER:

i. A *felony* (punishable by death or imprisonment over one year) and the judge decides the probative value outweighs the prejudicial effect.

Burden of proof: The prosecution bears the burden of proof to establish that the prior felony conviction should be admitted. *State v. Morales*, 215 Ariz. 59, 157 P.3d 479 (2007).

Factors which may be considered by the court include:

(1) recent crimes which are more probative;

(2) veracity-related crimes which are more probative;

(3) prior convictions where the defendant testified is *de facto* evidence he testified untruthfully, and

(4) prior convictions for a crime substantially different from the current charge are less prejudicial. *See State v. Green*, 200 Ariz. 496, 29 P.3d 271 (2001).

OR

b. A *crime (felony or misdemeanor) involving dishonesty or false statement.*

Definition: This phrase is restrictive and covers only perjury, subordination of perjury; false statement; criminal fraud; embezzlement; false pretenses, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the defendant's propensity to testify untruthfully. Livermore et al., *Arizona Practice, Law of Evidence,* §609:1 (4th ed. 2008). *See also State v. Hatch*, __ P.3d __, 2010 WL 3310267, *3 (2010).

Example: The crimes of robbery and possession of narcotics may not necessarily qualify under this section. *But see State v. Perkins,* 141 Ariz. 278, 686 P.2d 1248 (1984) (exception to this rule), *overruled on other grounds by State v. Noble*, 152 Ariz. 284, 288, 731 P.2d 1228, 1232 (1987).

TIME LIMIT: Less than 10 years have elapsed since the conviction or release from confinement whichever is later. See Livermore at § 609:2.

EXCEPTION: A conviction over 10 years old is admissible if: (1) the judge finds that the probative value together with specific facts substantially outweigh the prejudicial effect and (2) the adverse party gives advance notice of intent to use the conviction.

CONVICTION STILL ACTIVE: The conviction has been voided by EITHER:

a. pardon, amendment certificate of rehabilitation or equivalent. (Exception: The conviction will be admissible if there has been a subsequent conviction of a felony)

OR

b. any of those actions mentioned in 3(a), if the basis were the defendant's innocence. Livermore at § 609:3.

NOT A JUVENILE CONVICTION:

EXCEPTION: Court may, in the interest of justice, admit juvenile convictions to impeach witnesses other than the defendant. Livermore at § 609:4.

WHAT IS ADMISSIBLE: The cross examiner has the choice of either: (1) introducing the authenticated document without asking about the conviction on cross, or (2) eliciting a denial or on

admission of conviction on cross. He cannot have both. ER 402 (Cumulative objection) and ER 609 (first sentence). See also Livermore at § 609:1.

PROTECTING THE WITNESS: An attorney who intends to call a witness who has previously been convicted should consider doing the following:

1. Motion in limine: To bar the opponent from inquiring about a prior conviction which does not qualify under the above-stated rule. See *State v. Roque*, 213 Ariz. 193, 215, 141 P.3d 368, 390 (2006).

2. Drawing the sting: On direct examination, the witness may be asked about the prior conviction. *State v. Noble,* 126 Ariz. 41, 41, 612 P.2d 497, 497 (1980). *See generally State v. Dickson,* 143 Ariz. 200, 693 P.2d 337 (1985). If the witness is asked about good conduct, he may open the door to cross-examination about bad conduct. *See State v. Harrison*, 195 Ariz. 28, 33, 985 P.2d 513, 518 (App. Div. 1 1998) (defendant's attorney "drew the sting").

3. Showing Pending Appeal: While a conviction on appeal is admissible, evidence of the pending appeal is also admissible. ER 609(e); Livermore at § 609:5.

4. Limiting instruction: The jury normally will be instructed at the end of the case, but an instruction may be given at the time of the mentioning of the conviction. Livermore at § 609:1(L).

5. PRIOR STATEMENTS:

a. PRIOR INCONSISTENT STATEMENTS:

RULE: A witness may be examined about prior inconsistent statements, either oral or written to impeach the credibility of a witness if:

1. the prior statement is inconsistent with that made as a witness (inconsistency determined by the whole impression or effect of what has been said); and

2. the prior statement does not concern a collateral matter (the court has the discretion to permit impeachment on collateral matters). ER 613(b); Livermore at § 608:4.

Before a witness may be questioned about the statement, the judge has the discretion to require a foundation be laid by disclosing or showing the statement to the witness. ER 613(a).

EXTRENSIC EVIDENCE: Evidence of the prior statement (either writing itself or testimony of a witness to the oral statement) is admissible provided:

1. It is called to the attention of the witness and he is given an opportunity to explain or deny it and the opposing attorney is given an opportunity to ask about the statement. The court has the discretion to admit extrinsic evidence in the interest of justice even if the statement is not brought to the witness' attention. ER 613(b).

2. The witness admits making the statement. If the witness admits making the statement, the court may in its discretion exclude extrinsic evidence as being cumulative. ER 403. If the witness states that he cannot recall making the prior statement, the court may admit the extrinsic evidence. For an excellent discussion on the applicability of ER 613, see *State v. Woods,* 141 Ariz. 446, 452, 687 P.2d 1201, 1207 (1984).

3. The inconsistent statement does not concern a collateral matter. Extrinsic evidence usually is inadmissible on a collateral matter even though the witness denies making the prior statement. See Livermore at § 608:4.

WITH AN INADMISSIBLE BUT VOLUNTARY CONFESSION: Even though a defendant in a criminal case was not advised of his *Miranda* rights, he may be impeached by means of the confession which is inconsistent with the defendant's testimony. *Harris v. New York,* 401 U.S. 222, 226 (1971). However, the state bears the burden of proving that the confession was voluntary and, if the burden is not met, the prior statement of the defendant may not be used for impeachment. *Oregon v. Elstad,* 470 U.S. 298, 307 (1985).

ADMISSION OF PARTY OPPONENT: The above-described restrictions do not apply to admissions by a party opponent, such statements are admissible as substantive evidence. ER 613(b) and 801(d)(2).

ATTORNEY'S RIGHT TO DISCLOSE: On request, the prior statement must be disclosed to opposing counsel. ER 613(a).

LIMITING INSTRUCTION: The party harmed by the prior inconsistent statement may request an instruction limiting the use of the inconsistent statement to impeachment purposes only (unless it qualifies as substantive evidence under the below-mentioned rule). See "Objections-General," *infra,* for form of instruction.

NOTE: Impeachment by insinuation is improper. *See State v. Stabler*, 162 Ariz. 370, 373, 783 P.2d 816, 819 (App. Div. 2 1989).

AS SUBSTANTIVE EVIDENCE: A prior inconsistent statement will be admissible as substantive, rather than impeachment, evidence if the declarant testifies and is subject to cross-examination; and the prior statement was given under oath subject to the penalty of perjury at trial, hearing or other proceeding, or in a deposition. ER 801(d)(1)(A).

b. PRIOR STATEMENT USED TO REFRESH MEMORY:

RULE: When a witness has refreshed his memory with a written statement (even though the prior statement is only damaging and not inconsistent), the opposing party has the following rights (1) if the statement were used during the witness' testimony or (2) if the judge determines it is necessary in the interest of justice where the statement was used prior to trial.

1) *Inspection:* Upon request, opposing counsel may have the writing produced for inspection. Failure to produce could result in the witness' testimony being stricken;

2) *Cross-examination* concerning the statement, and

3) *Introduction into Evidence:* The opposing attorney is entitled to have those portions of the writing which are related to the testimony produced into evidence. If it is contended that portions of the statement are not related, the judge should review it *in camera* and exercise portions which are not related.

Authority: ER 612, see "Refreshed Recollection," *infra.*

c. REHABILITATION OF WITNESS:

See "Rehabilitation of Witness," *infra.*

Methods:

1) Prior consistent statement

2) Introducing other part of statement

3) Reputation for truthfulness

6. REPUTATION FOR UNTRUTHFULNESS:

If a proper foundation is laid, a witness' reputation for untruthfulness is admissible. ER 608(a).

FOUNDATION: The following formula may be used to prevent the testimony from being barred or stricken:

Q. Do you know the general reputation at the present time of John Doe in the community in which he lives for truthfulness?

A. Yes.
Q. What is the reputation?

A. Bad.

Voir Dire: The opposing party may be able to bar the testimony altogether by requesting to voir dire the character witness and establish that there is an inadequate foundation.

CROSS-EXAMINATION OF CHARACTER WITNESS: The judge has the discretion to permit the cross-examining attorney to inquire into specific instances of conduct concerning the truthfulness of the witness, about whom the character witness has testified. ER 608(b)(2).

REHABILITATION OF WITNESS: Once the witness' reputation for truthfulness has been attached, reputation testimony supporting the witness' truthful character is admissible, ER 608(a)(2) and see "Rehabilitation of Witness," *infra.*

7. PRIOR BAD ACTS:

The court has the discretion to permit cross-examination of a witness concerning his specific acts of conduct is such specific acts are probative to show untruthfulness. ER 608(b). *See State v. Dickens*, 187 Ariz. 1, 13, 926 P.2d 468, 483 (1996).

FACTORS TO CONSIDER: McCormick on Evidence, (2nd ed. 1972) page 83, outlines the following factors the court may use to guide the exercise of its discretion:

a. whether the testimony is crucial or unimportant;

b. the relevancy of the act of misconduct to truthfulness;

c. the nearness of remoteness in time of the misconduct to time of trial;

d. whether the matter inquired into is a nature that it will result in distracting and time consuming explanations, and

e. whether the witness will be unduly humiliated and there will be undue prejudice.

EXTRINSIC EVIDENCE: This type of cross is on collateral matter and if the witness denies prior misconduct, the cross examiner is stuck with the answer. Only prior convictions may be proved by extrinsic evidence. ER 608(b).

LIMITING INSTRUCTION: May be requested. ER 105.

RAPE CASES: Specific acts of alleged misconduct (acts of unchastity) by the victim are inadmissible on the issue of the witness' credibility. *See State v. Lujan*, 192 Ariz. 448, 450, 967 P.2d 123, 125 (1998).

8. EXPERT WITNESS:

Besides the above-mentioned rules which also apply to experts, the following apply to experts:

QUALIFICATION OF EXPERT: The expert is deficient in background training or education. *See* ER 702 and 104(e).

BASIS FOR OPINION: Experts may be cross-examined regarding the facts and data underlying his opinion. ER 705.

LEARNED TREATISES: An expert may be cross-examined concerning learned treatises (periodicals, pamphlets and treatises on the subjects of history, medicine or other science or act) if:

1. it is called to the attention of the witness on cross or it was relied on by witness in direct examination, AND

2. it is reliable authority established by: (a) admission on cross; (b) judicial notice; or (c) other expert testimony. ER 803(18).

SUBSTANTIVE EVIDENCE: Although the treatise itself is inadmissible, it may be read to the trier of fact and is substantive evidence (not just admissible to impeach the expert). ER 803(18).

9. POST ARREST SILENCE-CRIMINAL CASE:

The use of defendant's post arrest silence for the purpose of impeaching his testimony will violate the due process clause of the Fourteenth Amendment and constitute reversible error. *Doyle v. Ohio*, 426 U.S. 610 (1976).

EXAMPLE: Where the defendant claimed for the first time at trial, that he had been framed, it was reversible error for the prosecutor to cross-examine as to why he had not related the exculpatory story to the police at the time of arrest.

DISTINCTION: If a defendant waives his right to remain silent and gives an explanation, he may be cross-examined concerning his failure to deny and what he had not said. Where there was not an unequivocal post-arrest assertion of the right to remain silent and rather the defendant had volunteered a defense inconsistent with the one raised at trial, he could be cross-examined concerning his failure to relate the trial defense to the police.

INADMISSIBLE EVIDENCE

FORM: "Objection. The question calls for clearly inadmissible evidence."

A. GENERAL

Common types of inadmissible evidence are listed below.

B. CRIMINAL CASES

1. POLYGRAPH

RULE: Unless there has been a stipulation between the parties, the results of a polygraph examination are inadmissible. *State v. Zuck*, 134 Ariz. 509, 658 P.2d 162 (1982).

For the opinion of the polygrapher to be admissible, ER 702 and 704 would have to be satisfied. See "Opinion-Expert Witness," *infra*. *See also* Livermore et al., *Arizona Practice, Law of Evidence,* § 702:2, n.7 (4th ed. 2008), listing the general requirements for admissibility under *State v. Valdez,* 91 Ariz. 274, 371 P.2d 894 (1962).

EXCEPTIONS:

a. *Stipulation:* The polygraph results showing presence or absence of deception are admissible upon a stipulation of the state and the accused. *See State ex rel. Romley v. Fields*, 201 Ariz. 321, 324, 35 P.3d 82, 86 (App. Div. 1 2001).

b. *State's Witness:* The results of a polygraph test of a prosecution witness are admissible under the doctrine of *Brady v. Maryland,* 373 U.S. 83 (1963), which requires the prosecution to disclose any evidence which may tend to exculpate the defendant.

2. PLEAS, OFFERS OF PLEAS AND RELATED STATEMENTS

RULE: Except as otherwise provided by applicable Act of Congress, Arizona statute, or the Arizona Rules of Criminal Procedure, evidence of a plea of guilty, later withdrawn or a plea of *nolo contendere* or no contest, or an offer to plead guilty, *nolo contendere* or no contest to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers is not admissible against the person who made the plea or offer in any or criminal action or administrative proceeding.

However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of *nolo contendere*, or an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath and in the presence of counsel. This rule does not govern the admissibility of evidence of a deferred sentence imposed under Ariz. R. Crim. P. 17.4 and ER 410.

3. PAST SEXUAL BEHAVIOR OF SEX ASSAULT VICTIM

RULE: The past sexual behavior of the victim of a sexual assault is inadmissible. *See State v. Oliver*, 158 Ariz. 22, 25, 760 P.2d 1071, 1074 (1988); *State ex rel Pope v. Superior Court,* 113 Ariz. 22, 545 P.2d 946 (1976); *State v. Grice,* 123 Ariz. 66, 597 P.2d 548 (App. Div. 2 1979).

C. CIVIL CASES

1. SUBSEQUENT REMEDIAL MEASURES

RULE: When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. ER 407.

2. COMPROMISE AND OFFERS TO COMPROMISE

RULE: Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. ER 408.

3. PAYMENT OF MEDICAL AND SIMILAR EXPENSES

RULE: Evidence of furnishings or offering or promising to pay medical, hospital or similar expenses occasioned by an injury is not admissible to prove liability for the injury. ER 409.

4. LIABILITY INSURANCE

RULE: Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness. ER 411.

INCOMPETENT

FORM: "Objection. The witness is not competent (qualified) because he lacks personal knowledge."
"Objection on the ground that the witness is incompetent because ..."

HEARING ON OBJECTION: See "Preliminary Fact Determination," *infra*. and ER 104.

A. PERSONAL KNOWLEGE

1. LAY WITNESS RULE: A lay witness may not testify unless the evidence supports a finding that the witness has personal knowledge of the matter. The personal knowledge may be qualified by phrases such as: "It is my belief," or "My best recollection is . . ." ER 602 and 701.

2. EXPERT WITNESS RULE: An expert witness may render an opinion even if the expert lacks personal knowledge. The bases of the opinion may be either (1) perceived (personal knowledge) or (2) made known to him at or before the hearing. ER 602 and 703.

B. INCOMPETENCY GENERAL RULE

Every person is competent to be a witness except as otherwise provided in these rules or by statute. ER 601.

Note: Statutes and court rules, not evidence rules, spell out grounds for witness incompetency.

C. CIVIL CASES

1. AGE: A child over ten years old is presumed competent. Under ten, a child is incompetent if he appears incapable of receiving just impressions of the facts respecting which they are to testify, or of relating them truly. A.R.S. § 12-2201(2). *State v. Schossow*, 145 Ariz. 504, 703 P.2d 448 (1985) (leading Arizona case).

> NOTE: "A.R.S. § 12-2202 makes a competency determination by the trial court mandatory as to children under the age of ten. That determination must be made even in the absence of request or objection. ... The determination may ordinarily be made by *voir dire* examination of the child." *Id.* at 451. A.R.S. § 12-2202 is made applicable to criminal proceedings by A.R.S. § 13-4061.

2. MENTAL CAPACITY: Persons who are of unsound mind at the time they are called to testify are incompetent. "The test ... is whether the witness' mental derangement or defect is such that he deprived of the ability to perceive the event about which he is to testify or is deprived of the ability to recollect and communicate with reference thereto." *State v. Griffin*, 117 Ariz. 54, 570 P.2d 1067 (1977); *see also Zimmer v. Peters*, 176 Ariz. 426, 429, 861 P.2d 1188, 1191 (App. Div. 1 1993). "Where any doubt appears, the court may and should conduct a preliminary interrogation to determine the witness' mental capacity and whether the witness understands the nature and obligation of an oath." Livermore et al., *Arizona Practice, Law of Evidence,* § 601:3 at 276-78 (4th ed. 2008).

3. INTOXICATION OR DRUGS: A person intoxicated or under the influence of drugs is not rendered incompetent to testify merely because he was under the influence at the time of the incident or at the time he testifies. *State v. Jeffers,* 135 Ariz. 404, 661 P.2d 101105 (1983), cert. denied, 104 S.Ct. 199; *State v. Cruz*, 218 Ariz. 149, 166, 181 P.3d 196, 213 (2008).

4. CRIMINAL CONVICTION: Prior convictions do not disqualify a witness, since it is for the jury to determine whether a witness is credible. Livermore at § 601:3.

5. SPOUSE OF PARTY: See "Privileged Communications," *infra.*

6. DEAD MAN'S STATUTE: The general rule is that in a suit by or against the executor or administrator of an estate or the guardian of an incompetent, neither party can testify to statements by the decedent or incompetent. See A.R.S. § 12-2251.

> In Arizona, however, the judge is given discretion to admit testimony forbidden by statute when the interests of justice would be served. See Livermore at § 601:4. *See also Estate of Page v. Litzenburg*, 177 Ariz. 84, 92, 865 P.2d 128, 136 (App. Div. 1 1993); *Matter of Estate of Mustonen,* 130 Ariz. 283, 635 P.2d 876 (App. Div. 2 1981) (doing of justice is the real concern); *Mahan v. First National Bank of Arizona,* 139 Ariz. 138, 677 P.2d 301 (App. Div. 1 1984) (admission of testimony is within the discretion of the trial court).

7. JUDGE: The judge may not testify in the case over which he is presiding. ER 605.

8. JUROR: A juror may not testify in the case in which he is sitting. ER 606.

D. CRIMINAL CASES

1. AGE: Prior to 1985, A.R.S. § 12-2202 applied to criminal actions. However, A.R.S. § 13-4061 was later amended to provide that "every person is competent to be a witness" in any criminal trial. Accordingly, preliminary competency hearing of children under the age of 10 are no longer mandatory. Livermore at § 601:3. See also *State v. Superior Court in and for Pima County*, 149 Ariz. 397, 401, 719 P.2d 283, 287 (App. Div. 2 1986) and *Escobar v. Superior Court of State of Ariz. in and for Maricopa County*, 155 Ariz. 298, 746 P.2d 39 (App. Div. 1 1987).

2. MENTAL CAPACITY, DRUGS, AND INTOXICATION: Those who are of unsound mind, under the influence of drugs, or intoxicated at the time of their production for examination may be incompetent to testify. See C.2 (Mental Capacity), *supra,* for applicable requirements.

3. INTEREST: Witness are not disqualified because of interest in the case. Interest may be sown to effect credibility. See Livermore at § 601:3. The requirements of ER 602 must, likewise, be satisfied.

4. OTHER GROUNDS: A.R.S. § 13-4061: In any criminal trial every person is competent to be a witness.

ER 601: "Every person is competent to be a witness except as otherwise provided by statute or court rule."

a. CRIMINAL CONVICTION: Every person convicted of a crime (even perjury) is a competent witness in a criminal case. See C.4, *supra*. *See also* A.R.S. § 13-904(B).

5. SPOUSE OF A PARTY: See "Privileged Communications," *infra*.

6. JUDGE OR JUROR: A judge or juror may not testify in the trial in which they are presiding or sitting. ER 605 and 606.

IRRELEVANT

FORM: "Objection. Irrelevant."

RULE: Irrelevant evidence is inadmissible. ER 403. Whether evidence is relevant is a decision that rests within the sound discretion of the trial court and will be reversed on appeal only for clear abuse of discretion. *State v. Adamson*, 136 Ariz. 250, 259, 665 P.2d 972, 981 (1983); Livermore et al., *Arizona Practice, Law of Evidence,* § 402:1 (4th ed. 2008).

DEFINITION: Evidence is relevant if it is *material* (is of consequence to an issue in the lawsuit) AND it would *make the existence of a fact more or less probable than* without the evidence. ER 401.

OBJECTIONS TO RELEVANT EVIDENCE: Evidence which is relevant may be inadmissible on other grounds. The following checklist of some other objections.

1. Constitutional, statutory or other court rules prohibit such evidence, ER 402.

Examples: hearsay, rape victim's past sexual behavior, and illegally seized evidence.

2. The probative value is outweighed by the unfair prejudice.

3. Confusion of issues. ER 403.

4. Mislead the jury. ER 403.

5. Delay or time wasting. ER 403.

6. Cumulative. ER 403.

HEARING ON OBJECTION: See "Preliminary Fact Determination" and "Objections-General Rules," *infra.*

JUDICIAL NOTICE

FORM: "Objection. The proposed evidence should not be judicially noticed."

A. ADJUDICATIVE FACTS

RULE: To be judicially noticed, the following conditions should be satisfied:

a. the moving party should request that judicial notice be taken and provided necessary information to the court (the court can take judicial notice without a request);

b. the opposing party should be given an opportunity to be heard;

c. the fact should be an adjudicative fact ("Who-did-what-and-when type facts" - see below);

d. the fact should not be subject to reasonable dispute, AND

e. the fact is EITHER:

1. generally known within the trial court's jurisdiction OR

2. capable of accurate and ready determination by use of sources that cannot reasonably be questioned.

REASON FOR RULE: Save court time.

AUTHORITY: ER 201

WHEN: Judicial notice may be taken at any time and at any stage of the proceeding, even on appeal.

B. LEGISLATIVE FACTS

RULE: Legislative facts are those that are recognized everywhere (*e.g.*, political, social, or economic) and may be used by a court in determining whether a statute is reasonable and constitutional.

AUTHORITY: Livermore et al., *Arizona Practice, Law of Evidence,* §201:3 (4th ed. 2008).

JURY SELECTION

CHECKLIST OF COMMON OBJECTIONS: The guidelines adopted by the Superior Court Judge's Association (April 1976 and reprinted in Washington State Bar News, March, 1979) set forth a checklist of objections usable during *voir dire* as follows:

The judge will not allow questions which:

- have ALREADY BEEN ASKED:
- ANTICIPATE INSTRUCTIONS on law which have not been given;

- ask a juror to SPECULATE ON HIS VERDICT if certain facts are proven;
- SOLICIT A JUROR'S OPINION AS TO LAWS or legal terms:
- are clearly IRRELEVANT and seek to embarrass or establish report with a juror;
- questions that are in substance ARGUMENTS OF THE CASE; or
- questions which are grossly UNFAIR OR EMBARRASSING to the juror and questions 'where the average juror cannot possibly know the answer.

COURT RULE AND AUTHORITY FOR CHECKLIST OF OBJECTIONS: A *voir dire* examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges … The judge and counsel may then ask the prospective jurors questions touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case. See Ariz. R. Crim. P. 18.4.

TIME LIMITS AND EXTENT OF VOIR DIRE: are matters which lie within the discretion of the trial court, and the court has considerable latitude. *State v. Tims,* 143 Ariz. 196, 693 P.2d 333 (1985).

CHALLENGE TO JURORS:

A. PEREMPTORY CHALLENGE

CRIMINAL RULES PROVIDED:

1. Peremptory challenges defined: A peremptory challenge is an objection to a juror for which there is no reason given, but upon which the court shall exclude him. In prosecutions punishable by death, the defense and the State may challenge peremptorily ten jurors each; in prosecution for offenses punishable by imprisonment in a penitentiary and tried in Superior court six jurors each; in all other prosecutions tried in non-record courts, two jurors each. When several defendants are on trial together, each defendant shall be entitled to one-half the number of challenges provided above. Ariz. R. Crim. P. 18.5(g).

2. Peremptory challenges -how taken: After prospective jurors have been passed for cause, peremptory challenges shall be exercised alternately first by the prosecution then by each defendant until the peremptory challenges are exhausted or the jury accepted. Acceptance of the jury as presently constituted shall not waive any remaining peremptory challenges to jurors subsequently called. Ariz. R. Crim. P. 18.5(g).

3. Alternate Jurors: When the jury is selected the court may direct the selection of such additional jurors as it deems necessary. Each party hall be entitled to one peremptory challenge for each alternate juror to be selected. When several defendants be entitled to one-half the number of challenges provided above. If any time before submission of the case to the jury a juror is found unable to perform his duties the court shall order him discharged and the clerk shall draw the name of an alternate who shall take his place on the jury. Ariz. R. Crim. P. 18.2 (and comment), and Ariz. R. Crim. P. 18.5(h).

B. CHALLENGES FOR CAUSE

1. General Cause of Challenge:

Ariz. R. Crim. P. 18.4(b) and comment: General causes of challenge are:

4. A conviction for a felony;

5. A want of any of the qualifications prescribed by law for a juror;

6. Unsoundness of mind, or such defect in the faculties of the mind, or organs of the body, that renders him incapable of performing the duties of a juror in any action.

2. Particular kinds of causes for challenge:

a. Implied Bias: A challenge for cause can be based on a showing of facts from which an ordinary person would imply a likelihood of predisposition in favor of one of the parties. In addition, a juror may be challenged who:

i. Is related by consanguinity or affinity within the fourth degree to either party.

ii. Stands in the relationship of guardian and ward, attorney and client, master and servant or landlord and tenant, to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages, of the adverse party, or being surety or bail in the action called for trial, or otherwise, for the adverse party.

iii. Has served as a juror on a previous trial in the same action, or in another action, or in a criminal action by the State against either party, upon substantially the same facts or transaction.

b. Infirmity:

i. Has a defect in the functions or organs of the body which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the party challenging.

ii. Does not understand the English language sufficiently well to comprehend the testimony offered at the trial.

CHALLENGE TO THE PANEL: Either party may challenge the panel on the ground that in its selection there has been material departure from the requirements of law. Challenges to the panel shall be in writing, specifying the facts on which the challenge is based. They shall be made and decided before any individual juror is examined. Ariz. R. Crim. P. 18.4(a).

LEADING QUESTION

FORM: "Objection. Counsel is leading the witness."

RULE: Leading questions are permissible on:

1. CROSS-EXAMINATION OR

2. DIRECT EXAMINATION if one of the following conditions is met:

a. Necessary to develop the witness' testimony.

Examples:

- Limited capacity of a witness: children and persons with limited mental capacity may be asked leading questions when necessary. Livermore et al., *Arizona Practice, Law of Evidence*, § 611:4 (4th ed. 2008).

- Obtain the whole storage: Leading questions may be permitted on inconsequential facts.

- Witness with faulty memory.

b. The witness is hostile. Whether a witness is hostile is a matter resting within the discretion of the judge. *Id.*

c. The witness is an adverse witness. *Id.*

d. The witness as identified with an adverse witness. ER 611(c).

DEFINITION-LEADING QUESTION: A leading question is one that suggests the desired answer, and may include even a question which may be answered yes or no. A question which merely directs a witness to a particular subject matter is not leading. Livermore at § 611:4.

EXAMPLE: "Did you say that you refused?" *See also State v. Agnew,* 132 Ariz. 567, 647 P.2d 1165 (App. Div. 2 1982).

MISQUOTING WITNESS

FORM: "Objection. Counsel is misstating the testimony."

RULE: A question which misquotes a witness is improper for it is potentially misleading to the trier of fact.

AUTHORITY:

ER 611(a): The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth...(3) protect witnesses from harassment or undue embarrassment.

ER 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues or misleading the jury.

NARRATIVE ANSWER

FORM: "Objection. The question calls for a narrative answer." or "Objection. Form of the question."

RULE: Questions calling for narrative answers may permit the witness to introduce admissible evidence. As a result, they should not be allowed because the opposing party may have no opportunity to object. See ER 403 and 611(a) below. Where a narrative response is permitted, the court may require that the examination proceed by question and answer. Since a narrative presentation if often more economical of judicial time and more understandable to the trier, narratives should be forbidden only where the nature of the proposed testimony suggests that the risk of having inadmissible evidence get into the record is real and not merely speculative. Livermore et al., *Arizona Practice, Law of Evidence,* § 611:2(D)(5) (4th ed. 2008).

AUTHORITY:

ER 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, wast of time, or needless presentation of cumulative evidence.

ER 611(a): The court shall exercise reasonable control over the made and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time. . .

EXAMPLE: "Tell the jury what happened that day."

NON-RESPONSIVE TO QUESTION

FORM: "Objection. Move to strike the answer as non-responsive and to instruct the jury to disregard the answer."

RULE: When a witness gives an answer that does not respond to the question, the answer may be stricken and the jury instructed to disregard. A mistrial may be appropriate if the defendant in a criminal trial has been denied a fair trial when the court considers the nature and timing of remedial action by the court and the conduct of counsel. See Livermore et al., *Arizona Practice, Law of Evidence,* § 611:2(D)(2) (4th ed. 2008).

AUTHORITY:

ER 611(a): The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time. . . .

EXAMPLE:

Q. "Was that just last week or so?"

A. "Yes. After I had heard about what he had done to the kid."

OBJECTIONS--GENERAL RULES

RULE: To have an objection sustained or to preserve error, if there is an adverse ruling, an objection should meet the following requirements:

1. A SUBSTANTIAL RIGHT of a party should be AFFECTED, i.e., not harmless error, AND

2. PROPER FORM:

   a. if the objection is to the ADMISSION OF EVIDENCE then, it should be timely made or accompanied by a motion to strike AND STATE A SPECIFIC GROUND, OR

   b. if the objection is to the EXCLUSION OF EIDENCE, it should be accompanied by an offer of proof unless the nature of the evidence is apparent from the questions asked.

AUTHORITY: ER 103(a). See generally *State v. Thomas,* 130 Ariz. 432, 636 P.2d 1214 (1981).

CRIMINAL CASE: In a criminal case, the defense's failure to object or move for a mistrial will not bar the appellate court from considering fundamental error which denied the defendant a fair trial, and errors which

affect fundamental constitutional rights. *State v. Libberton,* 141 Ariz. 132, 685 P.2d 1284 (1984); *State v. Washington,* 132 Ariz. 429, 646 P.2d 314 (App. Div. 1 1982).

TIMELINESS OF OBJECTION: An objection is not timely if made after the answer unless there was no opportunity to object or it was not apparent from the question that the answer would be inadmissible. To preserve the error for appeal, a late objection should be coupled with a motion to strike. See Livermore et al., *Arizona Practice, Law of Evidence,* § 103:2 (4th ed. 2008).

LIMITING INSTRUCTION: If evidence is admissible for one purpose against one party but inadmissible for another purpose or against another party, a request for the court to instruct the jury concerning the proper scope of the evidence should be granted. ER 105.

INSTRUCTION SAMPLE FORM:

"Evidence has been introduced in this case on the subject of __ for the limited purpose of ___. You must not consider this evidence (for any other purpose) (for the purpose of __)."

EXAMPLE: Prior convictions of a defendant are admissible to impeach but for no other purpose.

MOTION IN LIMINE: Rather than risk that the jury might hear inadmissible evidence and rely upon an objection and motion to strike at the time of the offering of the evidence, it is often good practice to anticipate the offer and move to have the court prohibit counsel and his witnesses from mentioning the expected evidence. ER 103(c). *See State v. Hallman,* 137 Ariz. 31, 668 P.2d 874 (1983).

EXAMPLE: Defense motion in limine to prevent the prosecutor and witnesses from mentioning the defendant's inadmissible prior convictions.

HEARING BY JURY:

RULE: To the extent practicable, the jury should be protected from hearing inadmissible evidence. This includes offers of proof, statements, and questions. ER 103(c).

PRACTICE: Depending upon the court's preference, either request a side bar with the judge or ask that the jury be excused.

SANCTION: If the jury hears inadmissible evidence, the court may instruct it to disregard or if the error cannot be cured in this fashion, grant a mistrial.

JUST RESULT: In making or meeting objections, a party should keep in mind ER 102, which grants the trial judge discretion to construe the rules in such a way as to reach a just result. The rules are not to be applied mechanically.

OPINION-LAY WITNESS

FORM: "Objection. The question calls for an opinion which is ... (not rationally based on perception of the witness; not helpful; misleading, etc.)."

RULE: A lay witness may testify factually or in the form of an opinion or inference including opinion touching on the ultimate issue to be decided by the trier of fact (not opinion on law) only if:

1. It is "RATIONALLY BASED ON THE PERCEPTION OF THE WITNESS," AND

2. It is "HELPFUL TO A CLEAR UNDERSTANDING OF THE TESTIMONY or the determination of a fact in issue." ER 701 and 704.

3. BUT, lay opinion should be EXCLUDED because:

a. its probative value is substantially outweighed by danger of unfair prejudice, confusion or misleading the jury or

b. of considerations of delay, waste to time or presentation of cumulative evidence. ER 403.

OPINION--EXPERT WITNESS

FORM: "Objection. The question calls for an opinion which is . . . (of no assistance to the jury, misleading, etc.)."

RULE: An expert witness may testify factually or in the form of opinion including an opinion on an ultimate issue to be decided by the trier of fact if:

1. Scientific, technical or other SPECIALIZED KNOWLEDGE will assist the trier of fact in understanding the evidence or determining a fact in issue, AND

2. The expert is QUALIFIED by knowledge, skill, experience, training or education. ER 702 and 704.

TRIAL COURT'S DISCRETION: The admission of expert opinion is within the trial court's discretion and the court's ruling will not be overturned absent an abuse of discretion. *State v. Neal,* 143 Ariz. 93, 692 P.2d 272 (1984). Whether an expert is qualified is a matter within the trial court's discretion. *State v. Gentry,* 123 Ariz. 135, 598 P.2d 113 (App. Div. 2 1979). *See also State v. Chapple,* 135 Ariz. 281, 660 P.2d 1208 (1983).

BASIS FOR OPINION: Types of data or facts upon which an expert may base an opinion include:

1. Those perceived by him or made known to him at or before the hearing.

Example: A doctor performs a physical examination of a patient, or at trial a hypothetical question is posed containing a description of a person's physical condition, AND

2. Those inadmissible into evidence if reasonably relied upon by experts in a particular field in forming opinions.

Example: A doctor renders an opinion based upon a radiologist's report that he reviewed prior to trial. ER 703 and Comment.

HYPOTHETICAL QUESTION: Before an expert testifies to his opinion and supporting reasons, it is no longer required that the facts or data underlying the opinion be disclosed (i.e., hypothetical questions are unnecessary). However, the court in its discretion may require such disclosure by hypothetical question. ER 705.

CONCLUSION OF OPINION: The opinion should be excluded for these other reasons:

1. its probative value is substantially outweighed by the danger of unfair prejudice, confusion or misleading the jury OR

2. of considerations of delay, waste of time or presentation of cumulative evidence. ER 403.

HEARING ON OBJECTION: See "Preliminary Fact Determination," *infra*.

CROSS-EXAMINATION:

1. DISCOVERY: Because the facts or data supporting the expert's opinion need not be disclosed at trial and may include inadmissible information, it is important that the opposing party obtain full discover.

2. UNDERLYING FACTS: The expert may, in any event, be required to disclose the underlying facts or data on cross-examination. ER 705.

3. IMPEACHMENT: See "Impeachment," *supra*.

COURT APPOINTED EXPERTS: Under ER 706, the court appointed expert may be cross-examined by each party including the one calling him. *See also* Comment to ER 706.

PAROL EVIDENCE RULE

FORM: "Objection. The question calls for inadmissible parol evidence."

RULE: Parol evidence (oral or written) is not admissible to add to, subtract from, vary, or contradict written instruments which are contractual in nature, and which are complete, unambiguous, and not affected by accident, fraud or mistake. See *Richards Development Co. v. Sligh,* 89 Ariz. 100, 358 P.2d 329 (1961)(one of the leading cases in this area).

NOTE: The parol evidence rule is a rule of substantive law rather than a rule of evidence. *Id.*

PRELIMINARY FACT DETERMINATION: Before parol evidence will be disregarded, the agreement must be found to be final, integrated, and complete. The court may be requested to make such a determination in the absence of the jury. These determinations frequently involve the following:

1. MECHANICAL: A clear detailed contract, complete on its face will bar parol evidence. *See United California Bank v. Prudential Ins. Co.,* 140 Ariz. 238, 681 P.2d 390 (App. Div. 1 1983); *Issak v. Massachusetts Indem. Life Ins. Co.*, 127 Ariz. 581, 623 P.2d 11 (1981).

2. INTENT: If the parties to the contract intended other oral or written matters to be part of their contract, the court will abide by the intent of the parties. *See generally Taylor v. State Farm Mut. Auto Ins. Co.,* 175 Ariz. 148, 854 P.2d 1134 (1993).

COLLATERAL AGREEMENT EXCEPTION: An oral collateral agreement (one which the court finds is separate from the written contract) may be proven. *See Gainok v. Featherson,* 131 Ariz. 421, 641 P.2d 909 (App. Div. 2 1982) (promissory note to help show liability where ambiguity is present).

PARTIAL INTEGRATION EXCEPTION: Once the court finds that the parties intended this agreement to be partly in writing and partly oral, evidence of additional terms will be admissible. The evidence not in writing must not be inconsistent with the writing. *See Arnold v. Cesare,* 137 Ariz. 48, 668 P.2d 891 (App. Div. 2 1983); A.R.S. § 47-2202.

PRELIMINARY FACT DETERMINATION

RULE: The trial judge determines preliminary questions concerning the admissibility of evidence and the trier of fact decides what weight to give to admissible evidence. ER 104(a) and (e) and 1101(c).

TYPES OF PRELIMINARY QUESTIONS:

1. QUALIFICATION OF A WITNESS:

Rules of evidence: The judge is not bound by the rules in deciding this question except those rules relating to privilege.

Examples: Is the proposed expert qualified?

Does the witness have personal knowledge or memory of the about which he would testify?

Is a child competent to testify?

Reference: "Incompetency," *supra.* ER 601. "Opinion-Expert," *supra.* ER 702.

2. EXISTENCE OF PRIVILEGE:

Example: Is there a marital privilege?

Can the witness invoke the privilege against self-incrimination?

Reference: "Privileged Communication," *infra.*

3. ADMISSIBILITY OF EVIDENCE:

Rules of evidence: The judge is not bound by them (except those relating to privilege) in deciding the admissibility of evidence questions.

Examples: Was there a legal search and seizure? *United States v. Matlock,* 415 U.S. 164 (1964).

Has an item of evidence been sufficiently identified or authenticated?

Reference: "Authentication and Identification," *supra.* ER 901. "Best Evidence Rule," *supra.,* ER 1002.

HEARING ON THE PRELIMINARY QUESTION:

RULE: Hearings shall be conducted out of the hearing of the jury when the admissibility of confessions is being decided, when the accused requests it and will be a witness, or when justice requires it. AUTHORITY: ER 104(c).

CROSS-EXAMINATION OF DEFENDANT AT PRELIMINARY FACT DETERMINATION HEARING: At the hearing, defendant cannot be examined concerning other issues in the case.

CROSS-EXAMINATION OF DEFENDANT AT TRIAL: According to the comments to ER 104 (Preliminary Questions), the rule is not intended to effect the doctrine of *Harris v. New York,* 401 U.S. 222 (1971) which holds that a defendant may be impeached with prior inconsistent statements. *See State v. Edwards,* 136 Ariz. 177, 665 P.2d 59 (1983); *State v. Hutchinson,* 141 Ariz. 583, 688 P.2d 209 (App. Div. 2 1984). *See also* "Impeachment," *supra.*

PRIVILEGED COMMUNICATIONS

FORM: "Objection. The question calls for disclosure of privileged communication. On behalf of Mr. Smith, I claim the marital privilege."

RULE: Statements made by participants in a confidential relationship are privileged and may not be disclosed if objected to by a participant. Privileges are creatures of Arizona statutes, the Evidence

Rules, and court decisions.

REASON FOR RULE: To stimulate freedom of communication by participants in the protected relationship.

HEARING OF OBJECTION: A hearing on whether a privilege exists is conducted in accordance with ER 104. See "Preliminary Fact Determination," *supra.*

A. ATTORNEY-CLIENT:

STATUTE: A.R.S. § 12-2234 AND § 13-4062: An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

SCOPE OF THE PRIVILEGE:

The privilege covers: confidential acts as well as words, and communications to the attorney's staff.

The privilege does not cover: Identity of the client; pleadings; communications in furtherance of either a fraud or a crime;evidence delivered by the client to the attorney when the client is subject to a motion to produce; statements made when the attorney-client relationship did not exist, or information which the client discloses (in this instance, the client is deemed to have waived the privilege).

WHO CAN OBJECT: The client, not the attorney, is the holder of the privilege and either he or his attorney on his behalf may object. The attorney may not disclose without the client's consent.

AUTHORITY: Livermore et al., *Arizona Practice, Law of Evidence,* § 501:5 (4th ed. 2008).

B. HUSBAND-WIFE:

COMPETENCY v. PRIVILEGE: The Arizona statutes covers both the rule that one spouse is incompetent to testify against the other as well as the privilege rule that one spouse, without the others consent, may not disclose a confidential communication made during the marriage.

STATUTES:

A.R.S. § 12-2231: A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent.

A.R.S. § 12-2232: A husband or wife shall not, during the marriage or afterward, without the consent of the other, be examined as to any communications made by one to the other during the marriage, except:

1. In an action for divorce or a civil action by one against the other.

2. In a criminal action or proceeding as provided in the criminal code. (See A.R.S. § 13-4062(1) below)

3. In an action brought by the husband or wife against another person for the alienation of the affections of either.

4 . In an action for damages against another person for adultery committed by either husband or wife.

A.R.S. § 13-4062(1): A person shall not be examined as a witness in the following cases: (1) a husband for or against his wife without her consent, nor a wife for or against her husband without his consent, as to events occurring during the marriage, nor can either, during the marriage or afterward, be, without consent of the other, examined as to any communication made by one to the other during the marriage. These exceptions do not apply in a criminal action or proceeding for a crime committed by the husband against the wife, or by the wife against the husband, nor in a criminal action or proceeding against the husband for abandonment, failure to support or provide for or failure or neglect to furnish the necessities of life to the wife or the minor children. Either spouse may, at his or her request, but not otherwise, be examined as a witness for or against the other in a prosecution for bigamy or adultery, committed by either spouse, or fc: rape, seduction, the crime against nature or any similar offense, committed by the husband.

COMPETENCY: An incompetency objection applies:

1 . to any testimony of a spouse if the other spouse objects,

2 . if one spouse is a party to the lawsuit, and

3 . if the marriage exists when the spouse is called to testify.

Authority: ER 601

PRIVILEGE: A marital privilege objection applies:

1. only to confidential communications made during the marriage,

2. regardless of whether a spouse is a party to the lawsuit,

3. regardless of whether they are still married when the spouse or ex spouse is called to testify, and

4. to confidential acts committed in the presence of or with the knowledge of the spouse which would have been committed but for the confidential relationship.

WHO MAY OBJECT: The spouse who made the communication is the holder of the privilege. A silent spouse or ex spouse who did not adopt the communication may not claim the privilege. Failure to claim the privilege constitutes a waiver. If the communicating spouse testifies, the privilege is waived. Livermore et al., *Arizona Practice, Law of Evidence,* § 501:4 (4th ed. 2008).

EXCEPTIONS: Neither a marital privilege nor a marital incompetency objection applies to:

1. civil actions of one spouse against the other;

2. criminal prosecution for a crime committed by one spouse against the other (e.g., wife beating);

3. criminal proceedings for a crime committed by parent or step-parent against child (e.g., child beating); and

4. non support or desertion.

Authority: A.R.S. § 12-2232 and A.R.S. § 13-4062(1). *See also State v. Salzman,* 139 Ariz. 521, 679 P.2d 544 (App. Div. 2 1984).

C. PHYSICIAN-PATIENT:

STATUTES:

A.R.S. § 12-2235: In a civil action a physician or surgeon shall not, without the consent of his patient, be examined as to any communication made by his patient with reference to any physical or mental disease or disorder or supposed physical or mental disease or disorder or as to any such knowledge obtained by personal examination of the patient.

A.R.S. § 13-4062(4): A person shall not be examined as a witness in the following cases … A physician or surgeon, without consent of his patient, as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.

RULE: The privilege applies if:

1. a doctor-patient relationship exists,

   AND

2. the patient consulted the doctor for medical treatment or advice.

SCOPE OF PRIVILEGE:

The privilege covers: Not only the patient's statements but also all information gathered to treat the patient (e.g., X-rays and hospital staff).

The privilege does not cover: forensic examinations which are not for the purpose of attending the patient; involuntary commitment; communication in the presence of a third person if this and other circumstances indicate that the patient's intent was not to have the communication confidential; where a patient unlawfully attempts to obtain controlled substances; and child abuse cases. (see A.R.S. § 13-3620). *See generally Ziegler v. Superior Court,* 131 Ariz. 250, 640 P.2d 181 (1982).

WHO CAN OBJECT: The patient is the holder of the privilege (only he can waive it) and either the patient may claim it or the doctor witness may assert it for the patient. Livermore at § 501:7.

The patient waives the privilege if: he is present when the doctor testifies and fails to object or he calls the doctor as a witness.

The patient does not waive the privilege if: he commences a personal injury suit or he is deposed as an adverse witness and his opponent elicits privileged information.

See also A.R.S. § 12-2236.

NOTE: The presence of third parties constitutes a waiver since the confidential mature of the treatment or interview has been eliminated. Livermore at § 501:7.

CRIMINAL CASES: The victim cannot assert the privilege in order to shield the defendant from prosecution, and the victim defendant cannot claim the privilege for the victim to prevent the doctor's

testimony. *Id.*

D. PSYCHOLOGIST-CLIENT:

A.R.S. § 32-2085 (treated on same basis as attorney-client privilege). See Livermore at § 501:8(4). But see *State v. Stotts,* 144 Ariz. 72, 695 P.2d 1110 (1985) (as psychologists are not physicians, the physician-patient privilege does not apply to psychologist's testimony; A.R.S. § 4062).

E. GOVERNMENT REPORTS:

A.R.S. § 39-121 and A.R.S. § 42-1307: "The officer or custodian may refuse inspection . . . subject to judicial scrutiny." The officer has the "discretion to deny or restrict access where recognition of the interests of privacy, confidentiality, or the best interest of the state in carrying out its legitimate activities outweigh the general policy of open access." *Carlson v. Pima County,* 141 Ariz. 487, 687 P.2d 1242, 1246 (1984). *See also* A.R.S. § 8-519(B).

F. REPORTER AND INFORMANT PRIVILEGE:

A.R.S. § 12-2237: A person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station, shall not be compelled to testify or disclose in a legal proceeding or trial or any proceeding whatever, or before any jury, inquisitorial body or commission, or before a committee of the legislature, or elsewhere, the source of information procured or obtained by him for publication in a newspaper or for broadcasting over a radio or television station with which he was associated or by which he is employed.

DISCLOSURE OF INFORMANT: The court balances the public's interest in protecting the informant against the defendant's right to prepare a defense. Defendant bears the burden of showing justification for disclosure in that it is relevant or helpful to the defense or necessary to a fair determination of the case. When a showing is made, the court will examine the government's records *in camera.* See *State v. Grounds,* 128 Ariz. 14, 623 P.2d 803 (1981). See also Livermore at §501:8(6).

G. GRAND JURY:

A.R.S. § 13-2812 (Unlawful grand jury disclosure) and Arizona Rules of Criminal Procedure 12.1(d) and 12.8(c).

H. PRIEST-PENITENT:

A.R.S. § 12-2233 and A.R.S. § 13-4062(3): A clergyman or priest shall not, without the consent of the person making a confession, be examined as to any confession made to him in his character as clergyman or priest in the court of discipline enjoined by the church to which he belongs. See also Livermore at §501:8(1).

I. ACCOUNTANT-CLIENT:

A.R.S. § 32-749. This privilege has been held not to apply to criminal cases. *See State v. O'Brien,* 123 Ariz. 578, 601 P.2d 341 (App. Div. 2 1979).

J. AGAINST SELF-INCRIMINATION:

RULE: Under Article 2, § 10 of the Arizona Constitution and Fifth Amendment of the United States Constitution, any witness may claim the privilege against self-incrimination and refuse to answer incriminating questions.

WAIVER OF PRIVILEGE: When a defendant voluntarily takes the stand to testify he waives his

privilege against self-incrimination as to all matters concerning which cross-examination is properly. Livermore at § 501:9.

IMMUNITY: If a witness claims the privilege against self-incrimination and refuses to testify, the court may grant the witness immunity from prosecution. *Id.*

K. PAROLE OFFICER-PAROLEE:

There is no privilege between these individuals.

PUBLIC RECORDS AND DOCUMENTS

FORM: "Objection. The exhibit is not properly authenticated." "Objection. Not the best evidence." "Objection. Hearsay."

A. AUTHENTICATION:

RULE: Public documents and records are self-authenticating may be admissible under the exception to the hearsay rule provided in ER 803(8) provided they are properly authenticated under ER 901 and 902. The court rules and statutes set forth below are alternate, not mutually exclusive, authority. Direct testimony by the custodian of records is another method of authentication. One common exception to this rule prohibits the admission of police reports in criminal cases. ER 803(8). See Livermore et al., *Arizona Practice, Law of Evidence,* § 803:9 (4th ed. 2008).

ALTERNATE AUTHORITY:

1. EVIDENCE RULES;

Self-authentication. ER 902: Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

a. Domestic Public Documents Under Seal: A document bearing a seal purporting to be that of the United States, or any state, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

b. Domestic Public Documents Not Under Seal: A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1), having no seal, is a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

c. Foreign Public Documents: A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the

authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidence by an attested summary with or without final certification.

d. Certified Copies of Public Records: A copy of an official record or report or entry therein, or of a document authorized by law to e recorded or filed and actually recorded or filed in a public office, including date compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any applicable statute or rule.

ER 903. Subscribing witness testimony unnecessary: The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

2. FEDERAL STATUTE: 28 U.S.C.A. § 1739.

B. BEST EVIDENCE RULE:

ER 1005. PUBLIC RECORDS: The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with ER 902 (see above) or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then order evidence of the contents may be given.

NOTE: The best evidence rule (requiring the production of the original) does not apply to public documents because their production is often not feasible, as well as the concern that public files be kept intact and not disbursed throughout the various courts in Arizona. Livermore at § 1005:1.

C. HEARSAY:

RULE: Public records and reports are not excluded by the hearsay rule, and it is not necessary to prove that the declarant is unavailable.

AUTHORITY: See ER 803(8).

D. ABSENCE OF PUBLIC RECORD OR ENTRY:

ER Rule 803(10): To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with ER902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

NOTE: This Evidence Rule holds that such evidence is not excluded by the hearsay rule and there is not requirement that the declarant be available.

RECOLLECTION RECORDED

FORM: "Objection. Insufficient foundation to read the document."

RULE: A memorandum or record may be read into evidence (it may not be received as an exhibit unless offered by the adverse party) and is not excluded by the hearsay rule if:

1. the memorandum or record concerned a matter about which a witness once had knowledge;

2. the witness now has sufficient recollection to enable him to testify fully and accurately;

3. the item was made or adopted by the witness when the matter was fresh in his memory, and

4. the item reflects the witness' knowledge accurately.

AUTHORITY: See ER 803(5). See also Livermore et al., *Arizona Practice, Law of Evidence* § 803:6 (4th ed. 2008).

SEE: "Refreshed Recollection," *infra.*

REFRESHED RECOLLECTION

FORM: "Objection. Insufficient foundation in that there is no showing that the witness needs to refresh his memory" or "Objection. There is no showing that the witness is testifying from his independent recollection."

RULE: A witness may use a writing to refresh his memory if a foundation is laid by testimony that he needs to refresh his recollection. If after the witness refers to the writing, he has an independent recollection, then he may testify. The writing is inadmissible if offered by the party that called the witness. ER 612 and Livermore et al., *Arizona Practice, Law of Evidence,* § 612:1 (4th ed. 2008).

NEXT STEP-RECOLLECTION RECORDED: If the witness who has referred to the writing still does not have an independent recollection or cannot testify fully and accurately, the party who called the witness may be able to introduce the writing into evidence under the Recollection Recorded exception to the hearsay rule. ER 803(5). See "Recollection Recorded," *supra.*

RIGHTS OF ADVERSE PARTY: When a witness has refreshed his recollection with a writing, either before or during testimony, the adverse party has the following rights:

1. to inspect the writing;

2. to cross-examine concerning the writing, and

3. to introduce the writing into evidence.

AUTHORITY: ER 612. See "Impeachment," *supra.*

REHABILITATION OF WITNESS

GENERAL: A certain evidence only becomes admissible to rehabilitate a witness after the adverse party has taken action to impeach the witness.

A. PRIOR CONSISTENT STATEMENT:

RULE: Under ER 801(d)(1)(13), a prior consistent statement or assertive conduct is non-hearsay and admissible as substantive evidence if:

1. the declarant testifies at trial and is subject to cross-examination;

2. the prior statement is consistent with his testimony, and

3. the statement is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence.

It is not required to be recent as regards the trial but only that the contrivance be more recent than the consistent statement. The statement must have been made before the witness' motive to fabricate testimony arose. See Livermore et al., *Arizona Practice, Law of Evidence,* § 801:5 (4th ed. 2008).

B. REPUTATION FOR TRUTHFULNESS:

RULE: If a proper foundation is laid, evidence of truthful character is admissible to support the credibility of a witness but only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise. ER 608(a).

FOUNDATION: See "Impeachment," *supra,* for proper questions to a character witness.

C. CROSS-EXAMINATION OF CHARACTER WITNESS:

RULE: The judge has the discretion to permit the cross-examining attorney to inquire into specific instances of misconduct indicating untruthfulness by the witness about whom the character witness has testified. ER 608(b)(2).

REPETITIOUS

FORM: "Objection. Repetitious."

RULE: The trial court in its discretion may limit testimony to avoid unnecessary repetition.

AUTHORITY:

ER 611(a): The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . (2) avoid needless consumption of time, and . . . .

ER 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

See State v. Hensley, 142 Ariz. 598, 691 P.2d 689 (1984).

SELF-SERVING

FORM: "Objection. Self-serving hearsay."

RULE: If an out-of-court admission by a party is self-serving, in the sense that it tends to aid his case, and is offered for the truth of the matter asserted, then such statement is not admissible under the admission's exception to the hearsay rule. See Livermore et al., *Arizona Practice, Law of Evidence,* § 801:6 (4th ed. 2008). *See also* "Hearsay," *supra.*

PRACTICAL: In a criminal case, the defense may attempt to introduce the defendant's out-of-court, self-serving version in order to avoid subjecting the defendant to cross. So that there will be no self-serving statements in the presence of the jury, the prosecution may make a motion *in limine* to prohibit any reference to the statements.

EXAMPLES: An accused testifies that prior to trial he told a police detective he had been at a movie at the time of the alleged crime. In a criminal case, the defense attorney asks a police officer to recite the exculpatory statements made by the defendant when he was arrested.

SPECULATION

FORM: "Objection. The question calls for speculation."

RULE: A question asking a witness to speculate or guess is improper for the such speculation may mislead the jury or may not be based on personal knowledge.

AUTHORITY:

ER 602: A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of ER 703, relating to opinion testimony by expert witnesses.

ER 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . .

DISTINCTION: Experts and lay witness may under certain circumstances express opinions. See "Opinion-Lay Witness" and "Opinion-Expert," *supra.*

EXAMPLE: "Isn't it possible John Doe did not intend to hit you?"

STATEMENT TO JURY BY COUNSEL

A. OPENING STATEMENT

COMMON OBJECTIONS: "Objection (and request to approach the sidebar and/or ask that the statement be stricken and that the jury be instructed to disregard counsel's comment) because:

a. Counsel is arguing the case;

b. Counsel's statement is inflammatory and improper;

c. Counsel is unethically stating his personal opinion;

d. Counsel is misstating what will be contained in the evidence;

e. Counsel's statement comments on the (marital, attorney-client, etc.) privilege; or

f. Counsel is impugning the defendant with a racial slur.

PRESERVING ERROR:

RULE: In order to preserve error when there has been an improper remark by counsel, a curative instruction must be requested. In the absence of such a request, an appellate court will only reverse the trial

court where there was a substantial likelihood that the statement affected the verdict and deprived the defendant of a fair tiral. *State v. Libberton*, 141 Ariz. 132, 685 P.2d 1284 (1984); *State v. Washington*, 132 Ariz. 429, 646 P.2d 314 (App. Div. 1 1982).

SIDEBAR CONFERENCE: When the aggrieved party objects to counsel's statement and intends to move for a mistrial, a sidebar conference might be requested rather than stating the mistrial motion in the presence of the jury. At the sidebar, the mistrial motion can be stated and the court can decided whether to excuse the jury and hear the mistrial motion or to give the curative instruction, allow the opening statement to proceed and hear the mistrial motion at the next opportunity when the jury is not present. See *State v. Stuard*, 176 Ariz. 589, 601, 863 P.2d 881, 893 (1993).

PURPOSE OF OPENING: The purpose of opening statement is to outline material evidence which a party intends to introduce and based on anticipated evidence and reasonable inferences which can be drawn. Control of the content of the trial remarks rests within the sound discretion of the court. *State v. Eisenlord*, 137 Ariz. 385, 670 P.2d 1209 (App. Div. 1 1983). See also *United States v. Dinitz*, 424 U.S. 600 (1976) (concurring opinion of C.J. Berger).

1. ARGUMENTATIVE AND INFLAMATORY REMARKS

RULE: The statement should not be argumentative, inflammatory, or misstate what will be contained in the evidence or contain an expression of counsel's personal belief. See generally *Eisenlord, supra*.

EXAMPLE OF INFLAMATORY STATEMENT TO JURY: "Appellant 'smashed' the child against the crib." *State v. Turrubiates*, 25 Ariz. App. 234, 542 P.2d 427 (App. Div. 2 1975) (statement did not warrant reversal).

2. COUNSEL'S PERSONAL OPINION

RULE: Counsel must not express his own personal opinion as to the justness of a cause, as to the credibility of a witness, or as to the guilt or innocence of an accused. An expression of personal belief is distinguishable from a conclusion based on or deduced from the evidence. See *Turrbiates* and *Dinitz, supra*.

EXAMPLE: Improper: "I believe the defendant is guilty." Proper: "The evidence will prove the defendant is guilty."

3. MISSTATING EVIDENCE: Counsel may not misstate what will be contained in evidence. *Turribiates, supra*. However, in opening statement, an attorney is entitled to outline what the party intends to prove as long as it is supported by evidence or reasonable inferences therefrom, and are material to the issues of the case. It is good practice to preface such an outline as a warning to the jury that the parties' opening statements are not evidence.

4. VIOLATING PRIVILEGE: See next section B.

5. RACIAL SLUR: Counsel should not make a reference to the race of an opposing party so as to impugn him before the jury. See generally *Dinitz, supra*.

B. CLOSING STATEMENT

COMMON OBJECTIONS: "Objection (and request to approach the sidebar and/or ask that the statement be stricken and that the jury be instructed to disregard counsel's comment) because:

a. Counsel is stating his personal opinion;

b. Counsel is impugning the defendant with a racial slur;

c. Counsel's statement is inflammatory and improper,

d. Counsel is misstating the evidence, or;

e. Counsel's statement is a comment on (marital, attorney-client) privilege."

PRESERVING ERROR: See preceding section A.

1. COUNSEL'S PERSONAL OPINION, RACIAL SLUR AND INFLAMATORY STATEMENT: See preceding Section A.

2. MISSTATING EVIDENCE: It is improper to make a statement not based on the evidence. See *United States v. Dinitz*, 424 U.S. 600 (1976).

3. COMMENT ON EXERCISE OF PRIVILEGE

RULE: While a prosecutor in a criminal case may comment upon the fact that certain testimony is not denied, it is error to draw the jury's attention to the defendant's failure to testify for this would violate the privilege against self-incrimination. Also, comment upon the exercise of other privilege is improper. See Livermore et al., *Arizona Practice, Law of Evidence*, § 501:9 (4th ed. 2008).

C. COUNSEL'S COMMENTS

FORM: "Objection. Move to strike counsel's comment (and ask that the jury be instructed to disregard it)."

RULE: To the extent practicable, the jury should be protected from hearing inadmissible evidence including comments by counsel. ER 103(c).

PRACTICAL: Opposing counsel may attempt to make headway with the jury by inserting remarks during examination of witnesses, stating objections, and other times. An objection to such comments when sustained may cause opposing counsel's tactic to backfire.